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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLOVIS MCALPIN and
CAPITAL GROWTH REAL ESTATE FUND, INC.,

Petitioners,

—against—

MICHAEL F. ARMSTRONG, as Receiver of CAPITAL GROWTH COMPANY, S.A. (Costa Rica) and CAPITAL GROWTH COMPANY, S.A. (Panama), ROBERT MOORE, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH FUND and FRANCESCO GALOFARO, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH REAL ESTATE FUND, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether an order denying a motion to disqualify counsel is a final decision in a collateral matter as to qualify for appeal pursuant to 28 U.S.C. § 1291 under the "col-

lateral order" doctrine as set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[1]

2. Whether the law firm of a former government lawyer who, while employed by the government, had substantial direct, personal and supervisory involvement in a directly related case, may build a "Chinese Wall" between itself and the former government lawyer who is personally disqualified from acting as counsel and thus create a double ethical standard for former government lawyers and lawyers in private practice.

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[1] The importance of this question is highlighted by the fact that the Court has granted certiorari on a similar question. *In Re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377 (8th Cir. 1980), *cert. granted* sub nom. *The Firestone Tire & Rubber Company* v. *Risjord*, 48 U.S.L.W. 3726 (U.S. May 13, 1980). In fact, the Second Circuit discussed the grant of certiorari in *Firestone Tire* but chose to make its current view on disqualification known and not await this Court's guidance.

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Opinions Below

The Memorandum Decision of United States District Judge Henry F. Werker (Southern District of New York) on the motion of Clovis McAlpin and Capital Growth Real Estate Fund, Inc.,[2] to disqualify the law firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov is reported at 461 F. Supp. 622 (S.D.N.Y. 1978) and appears at Appendix C.[3] The opinion of a panel of the United States Court of Appeals by Judges Jon O. Newman, Ellsworth A. Van Graafeiland and Dudley B. Bonsal[4] is reported at 606 F.2d 28 (2d Cir. 1979) and appears at Appendix B. The opinion of the United States Court of Appeals *en banc* is reported at —— F.2d —— (2d Cir. 1980) and appears at Appendix A.

Jurisdiction

The *en banc* opinion of the Court of Appeals is dated and was entered on June 20, 1980. (App. A, p. 1) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

United States Code, Title 28 § 1291.

"Final decisions of the district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin

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[2] Defendants HS Equities, Inc., EHG Enterprises, Inc., Ariel E. Gutierrez, Enrique H. Guttierrez and Bradford Trust Company also joined in the motion but did not join in the appeal.

[3] References to the various appendices to this Petition will be designated as "App. ——." References to the Joint Appendix in the Second Circuit Court of Appeals, submitted herewith are designated "—— a".

[4] Judge Bonsal, United States District Judge for the Southern District of New York, was sitting by designation.

Islands, except where a direct review may be had in the Supreme Court."

Statement of the Case

This proceeding involves a motion to disqualify Gordon Hurwitz Butowsky Baker Weitzen & Shalov ("Gordon Hurwitz") as counsel for respondents in the context of an action alleging violations of the federal securities laws. Gordon Hurwitz should be disqualified because one of its members had direct personal supervision of the related matter when with the Securities and Exchange Commission ("SEC"). Jurisdiction in the United States District Court allegedly rests on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa; Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. § 80-1 et seq.; 28 U.S.C. § 1331(a); 28 U.S.C. § 1332; 28 U.S.C. § 1337.

(a) Underlying Action

On September 17, 1976, more than two years after the Receiver was appointed, respondents commenced this action, which seeks damages in excess of $24,000,000 and asserts that 30, mostly foreign, defendants, including petitioners, committed fraudulent acts in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5 promulated thereunder, 17 C.F.R. § 240.10b-5, Section 206 of the Investment Advisers Act, 15 U.S.C. § 80b-6 and Bahamian, Costa Rican and common law. These alleged acts occurred outside the United States and essentially involved foreign individuals and corporations having no connection with the United States.[5]

On April 22, 1977, respondents filed an amended complaint. All or part of eight claims of the amended complaint

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[5] Petitioners prosecute this petition without prejudice to their rights to move to dismiss the second amended complaint on the ground that the District Court lacks subject matter jurisdiction.

were dismissed by the Court. *Armstrong* v. *McAlpin* [1978 Transfer Binder], CCH Fed. Sec. L. Rep. ¶ 96,323 (S.D.N.Y. Feb. 1. 1978).[6]

On April 3, 1978, respondents filed a second amended complaint. This complaint too has been attacked on numerous grounds by motions which are currently pending before the District Court.

(b) Facts Underlying Disqualification

The Second Circuit is entitled to its own opinion but is not entitled to its own facts. The Court, apparently reacting to the so-called "amicus" briefs from "revolving door" lawyers, obscures the facts. Specifically, the Court's "facts," unsupported by the record, equat petitioners with Robert L. Vesco and wrongfully accuse petitioners of fleeing to Costa Rica to avoid prosecution.[7] As a result, this Court should look to the record to determine the real facts of this action.

The following facts are undisputed:

1. From 1967 to October 1975 Theodore Altman, Esq. ("Altman") served on the staff of the SEC and during the last three years was Assistant Director of the Division of Enforcement.

2. While Assistant Director at the SEC, Altman directly and personally supervised the investigation and SEC enforcement proceeding against the petitioners, including

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[6] A more comprehensive statement of the underlying claims is set forth in this opinion.

[7] Indeed, if, as the Second Circuit stated, the activities of McAlpin and Vesco are related, respondents' argument that they have built a "Chinese Wall" around Altman is without merit since respondents admit that Altman, while with the government and at Gordon Hurwitz, was and is substantially involved in Vesco matters. (174a)

McAlpin, which proceedings are the basis of the instant action.[8]

3. Michael F. Armstrong, respondent, was appointed Receiver at the specific request of the SEC while Altman was in direct and personal supervision of the matter.

4. Immediately after leaving the SEC in October 1975 Altman joined Gordon Hurwitz, respondents' attorneys.

5. Shortly thereafter, in March 1976, Armstrong, the Receiver, requested Altman's firm to represent him.

6. Altman is disqualified from acting as counsel.

7. All of Altman's confidential SEC records and work product consisting of thousands of pages of documents, files and testimony relating to this action have been turned over to his firm but have been denied to petitioners.

8. Gordon Hurwitz has held numerous conferences with Altman's SEC staff which conducted and which continues to prosecute the SEC enforcement proceeding.

9. On June 1, 1978, petitioners having obtained court-approved extensions of time to respond, first appeared in this action. On that day they filed their motion to disqualify Gordon Hurwitz.[9]

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[8] The Solicitor General on behalf of the United States in his *amicus* brief to the Court of Appeals admits that Altman "supervised and had direct personal involvement in the investigation of the defendants in the present action." Memorandum of the Solicitor General in his Petition for Rehearing and Suggestion for Rehearing *en banc*, pp. 1-2, dated October 1979.

[9] As Judge Newman properly stated in his dissent to the *en banc* decision, "the onus [for any delay] quite properly rests with [respondents counsel], which undertook a representation in the face of the Code's clear prohibition." App. A, p. 48. In any event, the most substantial delay was by the Receiver who, although appointed in September 1974, did not file this action until two years later, September 1976. To date issue has not been joined and minimal discovery has taken place.

From 1972 to 1975 Altman conducted[10] and had direct, personal supervision of the SEC investigation of *In the Matter of Clovis W. McAlpin, Capital Growth Fund, Capital Growth Company, S.A., New Providence Securities, Ltd. and New Providence Securities, Ltd., S.A.,* which is directly related to this action. Clovis W. McAlpin, Capital Growth Fund, New Providence Securities, Ltd. and New Providence Securities, Ltd., S.A. are all named as defendants by the Receiver. In connection with the SEC's investigation and subsequent litigation, SEC staff attorneys reported to Altman and he in turn "advised and gave direction" to them and "signed documents, including correspondence." (150a-151a)

During the SEC investigation, Mr. McAlpin, an alien residing in Costa Rica, received demands (98a, 103a) from Altman seeking compliance with an SEC subpoena which had been purportedly served by mail on May 13, 1974. (98a-99a) On August 6, 1974, less than a month before the SEC enforcement action was commenced, Altman again demanded that McAlpin comply with the subpoena. (105a) Altman stated:

> "I should point out that we have already gathered substantial information in this investigation. Your testimony would add to that body of information."

On September 3, 1974, as a result of the investigation, the enforcement proceeding, *SEC* v. *Capital Growth Company, S.A. (Costa Rica),* 74 Civ. 3779 (CES), was commenced (181a) and is still pending in the Southern District

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[10] The SEC by Supplemental Order Designating Additional Officers dated January 30, 1974, authorized Altman to take evidence and perform all other duties in connection with the conduct of the investigation of *In the Matter of Clovis McAlpin, et al.* (100a)

of New York.[11] Altman appears as an attorney of record on the SEC complaint as follows:

> "Theodore Altman
> Assistant Director
> Securities and Exchange Commission
> Division of Enforcement
> Washington, D.C. 20549." (198a)

On September 24, 1974, the District Court in *SEC* v. *Capital Growth Company, S.A. (Costa Rica), et al.*,[12] and at the specific request of Altman's staff, appointed Michael F. Armstrong, respondent, the Receiver of the Capital Growth Companies. (88a) On October 23, 1974, the District Court appointed the Receiver's own law firm, Barrett Smith Shapiro Simon & Armstrong, "the Armstrong Firm", to act as counsel to the Receiver. (131a) Indeed, it is apparent that for the next year Armstrong and his firm worked closely with Altman's SEC staff concerning this litigation.

Upon leaving the SEC in October 1975, Altman immediately joined Gordon Hurwitz. (151a) Shortly thereafter, in March 1976, the Receiver requested Altman's firm to act as litigation counsel because the Armstrong firm had a conflict of interest. Despite this conflict, the Armstrong firm continues in this action along with Altman's firm. App. A, p. 2.

The Court, the Receiver, Gordon Hurwitz and the SEC all knew of Altman's direct and substantial responsibility in the SEC proceedings against McAlpin and other de-

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[11] McAlpin, contending that the Court lacked jurisdiction, as he does in the instant action, did not appear and a default judgment was entered against him.

[12] All the defendants in the SEC action are parties in this action.

fendants.[13] Nevertheless, the Receiver's application to retain Gordon Hurwitz was granted on May 13, 1976. (127a) Although some discussion was had in the moving papers concerning screening, the order (127a) required absolutely no screening, set up no safeguards for the benefit of the judiciary, public or parties, nor provided any policing of violations by Gordon Hurwitz. In short, the order approved the Receiver's retention of Altman's firm without any guidelines.

In addition to having Altman as a member of the firm, Gordon Hurwitz has been given all of Altman's confidential SEC records with respect to the investigation and enforcement proceeding conducted and supervised by him. (82a) Petitioners, on the other hand, have been denied access to these files by the SEC which stated that "these records would not be further disclosed without prior Commission approval."[14] (110a) Further, Gordon Hurwitz has held numerous conferences with Altman's SEC staff which conducted and which continues to prosecute the SEC proceeding. (82a)

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[13] Apparently the *en banc* decision takes comfort in the fact that the SEC "approved" the retention of Altman's firm by the Receiver. (147a) However, even the District Court which denied the motion to disqualify dismissed this contention by stating ". . . the SEC cannot waive for [petitioners] their objections to the qualifications of [respondents'] counsel here." *Armstrong* v. *McAlpin*, App. C, p. 71. Interestingly, the author of the "I'm OK, you're OK" letter from the SEC, Marvin Jacob and his law firm, are now the subject of a motion to disqualify because of Jacob's activities while an SEC lawyer. *In re Continental Investment Corporation*, Civil No. 80-1362 (1st Cir., argued September 4, 1980). Further, the *en banc* decision overlooks the fact that the "appearance of impropriety . . . results when government agency attorneys, who later may seek private employment, make waiver decisions for their own agency." Note, "Conflicts of Interest and the Former Government Attorney," 65 *Geo.L.J.* 1025, 1051 (1977).

[14] This material, denied to defendants by both the SEC and Gordon Hurwitz (109a, 156a) consists of "thousands of pages of documents, files and testimony . . ." (82a).

Despite Altman's direct and substantial participation in the SEC proceedings related to this action and the complete integration of the SEC and Gordon Hurwitz, the Court of Appeals for the Second Circuit *en banc* refused to disqualify Gordon Hurwitz from acting as respondents' counsel.

Reasons for Granting the Writ

I.

Certiorari Is Required to Resolve a Conflict Among the Circuits as to the Appealability of an Order Denying Disqualification of Counsel.

There is a sharp division among the circuits as to the appealability of an order denying disqualification of counsel.

Of the circuits which have considered the question of appealability, five have held an order denying disqualification of counsel to be appealable as of right pursuant to 28 U.S.C. § 1291 and the "collateral order" doctrine set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Greene* v. *Singer Co.*, 509 F.2d 750 (3d Cir. 1971); *Aetna Casualty and Surety Co.* v. *United States*, 570 F.2d 1197 (4th Cir. 1978), *cert. denied*, 439 U.S. 821 (1978); *Brown & Williamson Tobacco Corp.* v. *Daniel International Corp.*, 563 F.2d 671 (7th Cir. 1976); *Fullmer* v. *Harper*, 517 F.2d 20 (10th Cir. 1975).

Five circuits, however, have concluded that such an order is not appealable. *Community Broadcasting of Boston, Inc.* v. *Federal Communications Commission*, 546 F.2d 1022 (D.C. Cir. 1976); *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *In re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377 (8th Cir.

1980), *cert. granted,* sub nom. *The Firestone Tire & Rubber Company* v. *Risjord,* 48 U.S.L.W. 3726 (U.S. May 13, 1980); *Cord* v. *Smith,* 338 F.2d 516 (9th Cir. 1964), *clarified,* 370 F.2d 418 (9th Cir. 1966).

The importance of this issue is highlighted by this Court's decision to grant certiorari in the *Firestone Tire* case. Indeed, the Second Circuit's own checkered history on the appealability of orders denying disqualification of counsel cries out for final resolution.

Over the past 25 years the Second Circuit has flip-flopped three times on the issue of appealability of motions to disqualify counsel. In *Harmar Drive-In Theater* v. *Warner Bros. Pictures,* 239 F.2d 555 (2d Cir. 1956) the Court squarely faced the issue and found such orders appealable. However, in *Fleischer* v. *Phillips,* 264 F.2d 515 (2d Cir. 1959), *cert. denied,* 359 U.S. 1002 (1959) the Court chose not to follow *Cohen or Harmar* and rejected appealability. The *Fleischer opinion* was followed that same year by *Marco* v. *Dulles,* 268 F.2d 192 (2d Cir. 1959). In *Marco* the Second Circuit again held that orders denying motions to disqualify were not appealable.

A unanimous *en banc* Second Circuit in *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.,* 496 F.2d 800 (2d Cir. 1974) overruled the *Fleischer* and *Marco* decisions and treated orders granting and denying motions to disqualify counsel in the same manner. The *en banc* Court by Chief Judge Kaufman stated:

> "Now in 1974 we believe that *Cohen* requires a return to the wisdom of *Harmar* and so we uphold the appealability of an order denying disqualification, just as we have long upheld the appealability of an order granting this. There is no sufficient basis for distinguishing between the two. In both situations the order is collateral to the main proceeding yet has

> grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." *Id.* at 805.

In the instant case, however, the Second Circuit has again chosen to change course and hold that orders denying motions to disqualify counsel are no longer appealable. This Court's grant of certiorari in the *Firestone Tire* case indicates its concern that this important procedural question be decided once and for all.

However, the granting of certiorari in *Firestone Tire* should not preclude review of the instant case by the Court since the failure to hear this appeal would preclude review of the important substantive issue in this case, namely the abuse by government lawyers of the "revolving door" between government and private practice. This issue of critical importance to both the bar and the public deserves this Court's attention.

II.

This Court in Exercise of Its Supervisory Power Should Clarify the Ethical Standards Governing Former Government Lawyers and Their Law Firms When the Former Government Lawyer Had Substantial Direct, Personal and Supervisory Involvement in a Matter Directly Related to a Matter Now Being Prosecuted by His Firm.

Despite the undisputed fact that Altman supervised and had direct personal involvement in the SEC investigation and action related to the instant case, the Second Circuit refused to disqualify Gordon Hurwitz from acting as respondents' counsel. This holding misapplies the Code of Professional Responsibility and the well settled case law

holding that disqualification of one member of the firm disqualifies the entire firm. Indeed the Second Circuit has created a double standard of ethical conduct, one for government lawyers and another for private practitioners. This Court in its exercise of supervisory powers over the ethical conduct of attorneys, *Roadway Express Inc.* v. *Piper,* 48 U.S.L.W. 4836 (U.S. June 24, 1980), should grant this petition to correct the uncertainty which the Second Circuit's *en banc* decision has created and to give guidance to the bench and bar concerning this serious question.

Disciplinary Rule 9-101(B) of the Code of Professional Responsibility provides that:

> "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibilty while he was a public employee."

Further, Disciplinary Rule 5-105(D) of the Code of Professional Responsibility provides that:

> "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partners, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."

In *United States* v. *Standard Oil Company,* 136 F. Supp. 345 (S.D.N.Y. 1955), then District Judge Kaufman, on a motion to disqualify defendant's counsel who previously served as government counsel for the Paris office of the Economic Cooperation Administration, stated:

> "[i]f he [the former government attorney] is not qualified to act, his firm [Sullivan & Cromwell] would be disqualified regardless of his participation, under the partnership-imputed knowledge theory [of *Laskey Bros.*]" *Id.* at 366, n. 43.

Further, in *Telos, Inc.* v. *Hawaiian Telephone Co.*, 397 F. Supp. 1314 (D. Hawaii 1975) the court disqualified plaintiff's attorney and his firm from participating in a civil action when the attorney formerly had been employed by the State, as a Deputy Attorney General, and took part in an antitrust action substantially related to the civil action. In disqualifying the firm as well as the individual attorney, the court stated:

> "[i]t is axiomatic that what one member of a firm cannot do, the firm cannot do." *Id.* at 1318

See also, Traylor v. *City of Amarillo, Texas,* 335 F. Supp. 423 (N.D. Texas 1971).

Further, in *Fund of Funds* v. *Arthur Andersen & Co.*, 435 F. Supp. 84 (S.D.N.Y. 1977), *aff'd in pertinent part,* 567 F.2d 225 (2d Cir. 1977), Judge Stewart in disqualifying counsel rejected screening by a Chinese Wall, and stated:

> "[i]t is apparent from reading the deposition testimony of the Morgan Lewis attorneys, that Morgan Lewis takes the position that such adverse representation within a firm of their size does not require disqualification because a 'Chinese Wall' was built in the firm between those attorneys representing Fund of Funds and those representing Andersen. They assert that no information passed between the two groups of attorneys and thus that no confidential information was disclosed. First, the Court finds that such a 'Chinese Wall' cannot be built within a single law firm." *Id.* at 96

On appeal, the Second Circuit, by then Chief Judge Kaufman, approved the District Court's conclusion:

> "Morgan Lewis argued below that it built a Chinese Wall within the firm and that no information passed

> between the two groups of attorneys and thus that no confidential information was disclosed. The Court below [Judge Stewart] found that no such 'Chinese Wall' could be created in a single firm. We incline to agree." *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 229 n.10 (2d Cir. 1977)

The rationale for disqualifying a firm when one member of the firm is disqualified is delineated in *Laskey Bros. of W. Va.* v. *Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). In *Laskey Bros.* the court, by Chief Judge Clark, stated:

> "[w]ithin the framework of [a] partnership the fact of access to confidential information through the person of the partner with such specialized knowledge is sufficient to bar the other partners, whether or not they actually profit from such access." *Id.* at 826-827

The rejection of the Chinese Wall theory has been clear and consistent. *Laskey Bros. of W. Va.* v. *Warner Bros. Pictures, supra; Cinema 5 Ltd.* v. *Cinerama Inc.*, 528 F.2d 1384 (2d Cir. 1976); *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); *Sapienza* v. *New York News Inc.*, 481 F. Supp. 676 (S.D.N.Y. 1979). By adopting the Chinese Wall the Second Circuit has erased the clear bright line established by Canon 9 which provides that "[a] lawyer should avoid even the appearance of professional impropriety."

In spite of the overwhelming precedent, the Second Circuit has now chosen to treat former government lawyers more favorably than private practitioners.[15]

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[15] This double standard has also been erroneously adopted by the Court of Claims in *Kesselhaut* v. *United States*, 555 F.2d 791 (Ct. Cl. 1977) and the District Court for the District of Columbia, *United*

(footnote continued on following page)

The Second Circuit's unseemly double standard is clearly manifested in *Cheng* v. *GAF Corporation,* Slip Op., No. 1199 (2d Cir., Docket No. 80-7254, August 26, 1980). In *Cheng* the Second Circuit disqualified the firm representing GAF because one of the attorneys employed by the firm had been previously employed by a legal services office which represented Cheng. In disqualifying GAF's counsel the Second Circuit by Judge Meskill totally rejected the "Chinese Wall" stating:

> "Although Gassel may not be personally involved in the *Cheng* defense, he is a member of a relatively small firm. The matter involved in his prior exposure to Cheng while at [legal services] is still being actively pursued by attorneys for GAF at the Epstein firm. Despite the Epstein firm's protestations, it is unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation. Unlike many disqualification motions that appear before this Court, here there exists a continuing danger that Gassel may unintentionally transmit information he gained through his prior association with Cheng during his day-to-day contact with defense counsel. *Citations omitted.* If after considering all of the precautions taken by the

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(footnote continued from preceding page)

States v. *McDonnell Douglas Corp.,* Criminal No. 79-516 (D.D.C., filed June 4, 1980). *Cf., Central Milk Producers Cooperative* v. *Sentry Food Stores, Inc.,* 573 F.2d 988 (8th Cir. 1978) in which the court refused to disqualify a firm when two of the firm's associates had previously worked on a related matter at the Justice Department since the moving party approved the use of screening procedures. In the instant case, however, no defendant approved any alleged "screening procedure." In addition, the Court in *Central Milk* by Chief Judge Stephenson, concluded:

> "[a]lthough we have determined that disqualification was not required in this case, our opinion should not be construed as an approval of the practice involved in this case which necessitates a probe of the outer limits of what constitutes permissible professional conduct." *Id.* at 993.

> Epstein firm this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect Cheng or members of the public to consider the attempted quarantine to be impenetrable. Although we do not question Mr. Gassel's integrity or his sincere efforts to disassociate himself from the *Cheng* case, we are not satisfied that under the facts of this case the screening will be effective, thus we look to Disciplinary Rule 5-105(D) and order the district court to disqualify the Epstein firm." *Id.* at 8.

The principal justification asserted for such a double standard is that the government's efforts to hire qualified attorneys may be hampered. However, not only is this justification without foundation,[16] it does not cure the public perception of impropriety by former government attorneys.

Indeed, the main thrust of the recently enacted Ethics in Government Act, 18 U.S.C. § 207, has been to eliminate the "revolving door" between government service and private practice. The legislative history of the Act justifies this conclusion:

> "18 U.S.C. 207 like other conflict of interest statutes, seeks to avoid *even the appearance* of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.
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[16] Even the Second Circuit deemed this argument "overly apocalyptial" yet denigrated Canon 9 by adopting the arguments of the "revolving door" lawyers. App. A, p. 24.

> "Today public confiidence in government has been weakened by a widespread conviction that federal officials use public office for personal gain, particularly after they leave government service. There is a sense that a 'revolving door' exists between industry and government; that federal officials 'go easy' while in office in order to reap personal gain afterward. That in turn leads to a suspicion that personal profit was the motivation for the appointment in the first instance. All of this is repulsive to universally held principles of public service." 1978 U.S. Code Cong. and Adm. News, p. 5998.

The *en banc* decision seriously undermines this legislation and the Code of Professional Responsibility by cutting the heart out of Canon 9.

Further, the Chinese Wall has been rejected by the new *Model Rules of Professional Conduct (Discussion Draft)* released by the American Bar Association Commission on Evaluation of Professional Standards ("Model Rules"). Model Rule 1.11 (Government Lawyer Conflict of Interest) states in pertinent part:

> (a) "A LAWYER SHALL NOT REPRESENT A PRIVATE CLIENT IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE.
>
> • • •
>
> (e) "IF A LAWYER IS REQUIRED BY THIS RULE TO DECLINE REPRESENTATION ON ACCOUNT OF PERSONAL AND SUBSTANTIAL PARTICIPATION IN A MATTER, EXCEPT WHERE THE PARTICIPATION WAS AS A JUDICIAL LAW CLERK, NO LAWYER IN A FIRM WITH THE DIS-

QUALIFIED LAWYER MAY ACCEPT SUCH EMPLOYMENT."

The Comments to Model Rule 1.11, in sharp contrast to the *en banc* decision, state that since a government attorney maintains a position of public trust, his conduct should be more strictly scrutinized than that of a private attorney.

> "[t]he risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. That risk exists even if the interests of the public and the private client are apparently in accord. . . . A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of the public authority."

The blatant abuse of the Code of Professional Responsibility in this case justifies the need for a definitive ethical guideline.[17] This Court need only focus on the complete turnover of Altman's entire SEC file consisting of thousands of pages of confidential documents, files and testimony to Altman's firm, all of which have been denied to petitioners. Further, Altman's firm has had extensive conferences with Altman's SEC staff which prosecuted and which continues to prosecute the SEC action related to this case. The incestuous relationship between Gordon Hurwitz and the SEC points out the abuses meant to be prevented by Model Rule 1.11.

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[17] The choice of the Gordon Hurwitz firm in the face of Altman's presence can only be explained by favoritism. In all of the Southern District of New York, is there no other firm of the capability of Gordon Hurwitz that could prosecute the Receiver's action? The answer is self-evident. Judge Bonsal at oral argument observed that there were "thousands of lawyers in the Southern District competent to handle this type of action." Despite the fact that only very limited discovery has taken place and issue has not been joined, Gordon Hurwitz has been awarded interim fees totaling $146,480.91.

Many government agencies submitted self-serving *amicus* briefs urging the Second Circuit to adopt the Chinese Wall and thus perpetuate the "revolving door" system. However, the government apparently only supports screening when it suits its needs. In *United States* v. *Kitchin,* 592 F.2d 900 (5th Cir. 1979), *cert. denied,* 444 U.S. 843 (1979), the government's *opposition* to screening was upheld by the Court which said:

> "[f]inally, given the presumed interplay among lawyers who practice together, the rule applies not only to individual attorneys but also requires disqualification of the entire firm as well as all employees thereof." *Id.* at 904

While the *en banc* Court disingenuously proclaims no need to "enter fully into the fray" over what is ethical,[18] its decision clearly sidesteps its duty to enforce ethical standards. (App. A, p. 25)

The *en banc* decision creates a double standard of professional conduct, one for government lawyers and another for private practitioners. Indeed, the dual standard obscures any clear guidelines necessary to govern the ethical conduct of the bar. Such a dual standard is unworkable, illogical and inconsistent with the Code of Professional Responsibility.

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[18] This statement overlooks its responsibility to the District Courts which "have charge of all matters relating to the discipline of members of the bar." Rule 5, General Rules of Southern and Eastern Districts of New York.

Conclusion

Certiorari should be granted to resolve once and for all the confiict among the circuits concerning the important procedural question of appealability of orders denying motions to disqualify counsel.

In addition, this Court should review the important substantive issue of disqualification of former government lawyers and correct the double standard which the *en banc* opinion endorses.

Dated: September 18, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

En Banc Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 745—September Term, 1979

(Submitted to the En Banc
Court February 22, 1980 Decided June 20, 1980)

Docket No. 79-7042

MICHAEL F. ARMSTRONG, et al.,

Plaintiff-Appellees,

—against—

CLOVIS MCALPIN, et al.,

Defendant-Appellants.

Before:

KAUFMAN, Chief Judge,
FEINBERG, MANSFIELD, MULLIGAN, OAKES
TIMBERS, VAN GRAAFEILAND, MESKILL,
and NEWMAN, Circuit Judges.*

Appeal en banc from order entered in the United States District Court for the Southern District of New York, Henry F. Werker, J., denying defendants' motion to disqualify plaintiffs' counsel.

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* The order granting en banc reconsideration of this appeal was filed on December 12, 1979. Judge Gurfein, who was a member of the en banc court, unfortunately died on December 16, 1979. Prior to his death, he did not have the opportunity to vote on the merits of the appeal. Judge Kearse, subsequent to December 12, 1979, disqualified herself.

Appendix A—En Banc Decision of the United States Court of Appeals for the Second Circuit

Affirmed. Prior opinion of the panel, 606 F.2d 28 (2d Cir. 1979), vacated. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974), overruled.

GORDON HURWITZ BUTOWSKY BAKER WEITZEN & SHALOV, New York, NY (Franklin B. Velie, Paul D. Wexler, Bruce Siegel, of Counsel), for Plaintiffs-Appellees.

BARRETT SMITH SCHAPIRO SIMON & ARMSTRONG, New York, NY (Michael F. Armstrong, Martin F. Richman, Eric T. Singer, Susan L. Gotbetter (not yet admitted), of Counsel), for Receiver Michael F. Armstrong.

LUNNEY & CROCCO, New York, NY (J. Robert Lunney, Michael J. McAllister, James J. DeLuca, of Counsel), for Defendants-Appellants.

ALICE DANIEL, Assistant Attorney General, Washington, DC (Robert E. Kopp, Frederick D. Cohen, Attorneys, Civil Division, Department of Justice, Washington, DC, of Counsel), for the United States as *Amicus Curiae.*

RALPH C. FERRARA, General Counsel, Securities and Exchange Commission, Washington, DC (Paul Gonson, Solicitor, John P. Sweeney, Assistant General Counsel, Anne C. Flannery, Special Counsel, Harlan W. Penn, Attorney, of Counsel), for the Securities and Exchange Commission as *Amicus Curiae.*

ROBERT S. BURK, Acting General Counsel, Interstate Commerce Commission, Washington, DC (Frederick W. Read, III, Associate General Counsel, of Counsel), for the Interstate Commerce Commission as *Amicus Curiae.*

BRIEN E. KEHOE, General Counsel, Federal Maritime Commission, Washington, DC (Edward G. Gruis, Deputy General Counsel, John C. Cunningham, Attorney, of Counsel), for the Federal Maritime Commission as *Amicus Curiae.*

JOHN G. GAINE, General Counsel, Commodity Futures Trading Commission, Washington, DC for the Commodity Futures Trading Commission as *Amicus Curiae.*

ERWIN N. GRISWOLD, Washington, DC (Donald I. Baker, Griffin B. Bell, Robert H. Bork, Calvin J. Collier, Jr., Ronald J. Dolan, Michael J. Egan, Ralph E. Erickson, John R. Ferguson, Rudolph W. Giuliani, Robert B. Hummel, Owen M. Johnson, Thomas F. Kauper, Edward H. Levi, Michael R. McQuinn, Gerald P. Norton, Jonathan Rose, Jonathan C. Rose, William D. Ruckelshaus, Antonin Scalia, Laurence H. Silberman, Joe Sims, William E. Swope, Donald F. Turner, Harold R. Tyler, Jr., Alan S. Ward, of Counsel), for Certain Lawyers as *Amicus Curiae.*

FEINBERG, Circuit Judge (with whom Kaufman, Chief Judge, and Mansfield, Oakes and Timbers, Circuit Judges, concur):

In this en banc proceeding, we are called upon to consider two significant issues: the appealability of orders denying a motion to disqualify an attorney and the standard to be applied by the trial judge in ruling upon such motions. Clovis McAlpin and Capital Growth Real Estate Fund,

Inc., two of numerous defendants in a suit seeking over $24 million for violation of federal securities laws, appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, J., denying their motion to disqualify the law firm representing plaintiffs. The appeal was first heard by a panel of this court, which concluded that the trial judge had erred in denying defendants' disqualification motion. 606 F.2d 28 (2d Cir. 1979). A majority of this court voted to grant en banc reconsideration of the appeal, and directed the parties to brief both the merits of the appeal and also the question whether an order granting or denying a disqualification motion should be appealable. Subsequently, the parties and a number of amici filed comprehensive briefs on the issues before the en banc court. After full consideration, we affirm the order of the district court and vacate the earlier decision of the panel. We also hold that henceforth orders denying disqualification motions will not be appealable, thus overruling our en banc decision in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (1974). The reasons for these rulings are fully set forth below.

I. *The Facts*

Appellants' motion to disqualify is based on the prior participation of Theodore Altman, now a partner in the law firm representing plaintiffs-appellees, in an investigation of and litigation against appellants conducted when he was an Assistant Director of the Division of Enforcement of the Securities and Exchange Commission (the SEC). In September 1974, after a nine-month investigation, the SEC commenced an action in the United States

District Court for the Southern District of New York against Clovis McAlpin and various other individual and institutional defendants. The complaint alleged that McAlpin and the other defendants had looted millions of dollars from a group of related investment companies, referred to here collectively as the Capital Growth companies; McAlpin was the top executive officer of these companies. The SEC suit sought, among other things, the appointment of a receiver to protect the interests of shareholders in the Capital Growth companies. When McAlpin fled to Costa Rica and certain other defendants failed to appear, the SEC obtained a default judgment; in September 1974, Judge Charles E. Stewart appointed Michael F. Armstrong, the principal appellee in this appeal, as receiver of the Capital Growth companies. See SEC v. Capital Growth Company, S.A. (Costa Rica) et al., 391 F. Supp. 593 (S.D.N.Y. 1974).

One of Armstrong's principal tasks as receiver for the Capital Growth companies is to recover all moneys and property misappropriated by defendants; to further this task, Armstrong was authorized to initiate litigation in the United States and abroad. In October 1974, Judge Stewart granted Armstrong's request to retain as his counsel the New York firm of Barrett Smith Shapiro & Simon.[1] Shortly after the appointment of Armstrong, the SEC made its investigatory files available to him, in accordance with its practice, we are informed in its brief, of assisting "the efforts of receivers who have been appointed by the courts in Commission law enforcement

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[1] Armstrong was a partner of that firm, which is now Barrett Smith Shapiro Simon & Armstrong.

actions." Cf. SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (2d Cir. 1972). The Barrett Smith firm reviewed these files, conducted its own investigation for the receiver, and assisted him in taking possession of various Capital Growth properties in the continental United States and in Puerto Rico. For the next year and a half, we are told, Barrett Smith devoted approximately 2,600 hours to assisting the receiver, which included the services of five partners and eight associates; a little over half of this time was spent preparing for litigation.

In early 1976, however, the receiver and Barrett Smith became aware of a potential conflict of interest involving an institutional client of Barrett Smith that might become a defendant in litigation brought by the receiver. Thus, despite Barrett Smith's substantial investment of time, the receiver concluded that it was necessary to substitute litigation counsel. The task, however, was not an easy one; McAlpin had fled to Costa Rica with most of the assets of the Capital Growth companies and hence the funds available to Armstrong to secure new counsel were quite limited.[2] It was therefore necessary to find a firm that could not only handle difficult litigation in Costa Rica and in the United States, but would also commit itself to conclude the task, even if little or no interim compensation was available.[3] Moreover, it was important to retain a law firm large enough to cope with the immense paper work

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[2] Cash on hand was then about $200,000; it is apparently not much more now.

[3] Up to that time, neither Barrett Smith nor the receiver had been awarded any fees; subsequently, there were some interim allowances for Barrett Smith but Armstrong as yet has received no compensation.

soon to be generated by the firms that would probably represent the institutional defendants.[4]

Because of these considerations, appellees assert, the receiver focused on firms already involved in litigation against Robert L. Vesco, who, like McAlpin, had fled to Costa Rica rather than face possible prosecution for numerous alleged securities fraud violations. After abortive negotiations with two such firms, the receiver in April 1976 retained the law firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov, the firm that is the target of appellants' disqualification motion. According to Armstrong, the Gordon firm was chosen in part because one partner, David M. Butowsky, was then Special Counsel to International Controls Corporation and was involved in legal work in Costa Rica relating to the alleged Vesco defalcations, while another partner had specialized experience in prosecuting complex fraud cases. In accepting the representation, the Gordon firm agreed to "conduct all Capital Growth litigation through to a conclusion" even if the receiver could not compensate the firm as the litigation progressed.

In October 1975, some seven months before the receiver obtained substitute counsel for Barrett Smith, Theodore Altman ended his nine-year tenure with the SEC to become an associate with the Gordon firm. At the time of his resignation, Altman had been an Assistant Director of the Division of Enforcement for three years, and had about twenty-five staff attorneys working under him. As

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[4] After the receiver's complaint was subsequently filed, some of the largest and most prestigious New York firms appeared for the various defendants.

a high-ranking enforcement officer of the SEC, Altman had supervisory responsibility over numerous cases, including the Capital Growth investigation and litigation. Although he was not involved on a daily basis, he was generally aware of the facts of the case and the status of the litigation. The SEC's complaint was prepared and filed by the staff of the New York Regional Administrator, and the litigation was handled by the New York office. Altman's name appeared on the SEC complaint, although he did not sign it.

At the time that Altman joined the Gordon firm, the receiver had no reason to know that Altman had left the SEC or to be aware of his new affiliation. Subsequently, during the initial meetings with the Gordon firm, Armstrong first learned that Altman had recently become associated with the firm. Both the Gordon firm and Barrett Smith researched the question of the effect of Altman's prior supervisory role in the SEC suit. The two firms concluded that under applicable ethical standards discussed in Part IV of this opinion, Altman should not participate in the Gordon firm's representation of the receiver, but that the firm would not be disqualified if Altman was properly screened from the case. The matter was brought to the attention of Judge Stewart, who nonetheless authorized the receiver to retain the Gordon firm. Shortly thereafter, the firm asked the SEC if it had any objection to the retention, and was advised in writing that it did not, so long as Altman was screened from participation. Barrett Smith then turned over its litigation files to the Gordon firm, including those received from the SEC; in September 1976, the receiver filed the action by plaintiffs-

appellees against defendants-appellants that gave rise to this appeal.[5]

In June 1978, almost two years after the commencement of this action, appellants filed their motion to disqualify the Gordon firm because of Altman's prior activities at the SEC. In December 1978, Judge Werker, to whom the case had been reassigned, denied the motion. In his opinion, the judge concluded that the Gordon firm had carried out the letter and spirit of the relevant bar association ethical rulings, that the firm's representation of the receiver was not unethical and did not threaten the integrity of the trial, and that appellants had suffered no prejudice as a result of the representation. 461 F. Supp. 622 (S.D.N.Y. 1978). As already indicated, in September 1979 a panel of this court reversed the decision of the district court; in December 1979, this en banc proceeding was ordered and a briefing schedule fixed. We now turn to the issues before us.

II. *Appealability*

On our own motion, we asked the parties to brief the question of appealability because we have become concerned over the practical effects of our decision six years ago in Silver Chrysler Plymouth, Inc v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc), which overruled our prior practice and allowed immediate appeals from orders denying disqualification. That concern now

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[5] A more complete statement of the underlying facts in this action is set forth in Armstrong v. McAlpin, [1978 Transfer Binder] Fed. Sec. L. Rep. ¶ 96,323 (S.D.N.Y. 1978), which deals with defendants' motion to dismiss the complaint.

leads us to re-examine the conceptual basis of *Silver Chrysler.*

As we pointed out recently in Eckles v. Furth, 557 F.2d 953, 955 (2d Cir. 1977), "[t]he appealability of disqualification orders has had a checkered history in this court." Before *Silver Chrysler,* orders granting a motion to disqualify were generally held to be appealable, albeit without much discussion. See, e.g., W.E. Bassett Co. v. H.C. Cook Co., 302 F.2d 268 (2d Cir. 1962) (per curiam). The rationale was stated to be that "[a]n order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney . . . ." Fleischer v. Phillips, 264 F.2d 515, 517 (2d Cir.), cert. denied, 359 U.S. 1002 (1959). On the other hand, orders denying a motion to disqualify were usually viewed as nonappealable. Id. However, our unanimous en banc opinion in *Silver Chrysler* changed the latter rule so that orders granting and orders denying disqualification motions were henceforth both immediately appealable as a matter of right.

The result of obtaining that surface symmetry soon manifested itself. In recent opinions, many members of this court have noted that the availability of an immediate appeal has seemingly contributed to the proliferation of disqualification motions and the use of such motions for purely tactical reasons, such as delaying the trial. See, e.g., Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977);[6] W.T. Grant Co. v. Haines, 531 F.2d 671, 677-78 (2d Cir. 1976);[7]

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[6] The panel consisted of Judges Lumbard, Oakes and Meskill.

[7] The panel consisted of Judges Anderson, Feinberg and Mulligan.

Lefrak v. Arabian American Oil Co., 527 F.2d 1136, 1138-39 (2d Cir. 1975);[8] J.P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) (Gurfein, J., concurring); see also Van Graafeiland, Lawyer's Conflict of Interest—A Judge's View (Part II), N.Y.L.J., July 20, 1977, p. 1, col. 2. While we cannot determine with precision the amount of the increase in such motions, we are left with the clear impression that they have substantially grown in number.[9] More significantly, we see in microcosm in this appeal the

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[8] The panel consisted of Judges Mulligan, Van Graafeiland and Meskill.

[9] As to the accurancy of this impression, we note that the "position" Judge Mulligan has taken is, in his words, "one of tergiversation." Despite his present view, not long ago he observed that "[s]ince this court had reversed our prior rule and held that denials of motions to disqualify counsel are directly appealable to this court . . . such motions and appeals have proliferated." W.T. Grant Co., supra, 531 F.2d at 677-78; see also Lefrak, supra, 527 F.2d at 1138-39. In any event, we continue to believe that the use of disqualification motions has increased. For its statistical analysis, the dissent relies primarily on eleven opinions of this court published in the six-year period since *Silver Chrysler*. However, the number of published opinions is an inadequate measure of the prevalence of appeals (particularly meritless ones) from denials of disqualification motions, for it fails to account for the substantial number of appeals that are dismissed prior to a hearing on the merits or are disposed of by a summary order of affirmance. We have no doubt that a careful canvassing of these cases since 1974 would reveal a significant number of appeals from denials of disqualification motions. Thus, a cursory examination of calendared appeals terminated during one year of the six-year period revealed three such cases. See Kennecott Copper Co. v. Curtiss-Wright Corp., 78-7165 (appeal withdrawn December 19, 1978); CITC Industries, Inc. v. Manow Int'l Corp., 78-7135 (affirmed by order September 7, 1978); Banque de Financement, S.A. v. Interphoto Corp., 78-7130,-7131 (affirmed by order November 16, 1978). We remain convinced that appeals from denials of disqualification motions are neither scarce nor as meritorious as Judge Mulligan's dissent assumes.

practical effect on the progress of a litigation of a rule allowing appeals from denials of disqualification motions. Since June 1978, when appellants moved to disqualify the Gordon firm, the litigation in the district court has been frozen in its tracks. We recognize that the en banc procedure has inevitably contributed to the period of delay, but the bulk of the delay has stemmed from the initial appeal of the denial of disqualification. Such a prolonged interruption in a litigation charging serious abuses of the securities laws raises grave questions of judicial administration. And while such concerns by themselves do not justify a conclusion that *Silver Chrysler* was improperly decided, they do suggest that a careful reconsideration of the issue of appealability is appropriate. The reconsideration, we find, reveals that the conceptual basis of *Silver Chrysler* was flawed.

The basis of our decision in *Silver Chrysler* was that appeals from denials of disqualification motions fell within the narrow exception to the final judgment rule recognized by the Supreme Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-47 (1949). *Cohen* held that certain orders were immediately appealable (1) if they were collateral to the merits; (2) if denial of an immediate appeal would result in irreparable damage to the party seeking review; and (3) if the issue raised was "too important" to "be deferred until the whole case is adjudicated." In concluding that denials of disqualification motions were immediately appealable, *Silver Chrysler* simply noted that "[a]ll three prerequisites of *Cohen* are met" without providing any detailed analysis. 496 F.2d at 805. While it is clear that rulings on disqualification motions are collateral to the

merits, thus satisfying the first requirement of *Cohen*, the second and third requirements are not so easily disposed of.

With regard to the adequacy of review on appeal after final judgment, *Silver Chrysler* flatly concludes that it would be "fatuous to suppose that [such] review . . . will provide adequate relief." 496 F.2d at 805. It is true that a party whose disqualification motion is denied will be forced, if denied an immediate appeal, to bear the time and expense involved in a trial that may possibly be tainted. Nonetheless, we do not think the harm caused by erroneous denial of a disqualification motion differs in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection or orders denying motions for recusal of the trial judge. In those situations, we have held that no immediate appeal is available as a matter of right. American Express Warehousing, Ltd. v. Transamerica Ins. Co., 382 F.2d 277, 281-82 (2d Cir. 1967); Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966). Moreover, the harm caused by an erroneous denial of a disqualification motion is usually not irreparable since this court retains its traditional power to grant a new trial if the district court's ruling ultimately turns out to be incorrect. Furthermore, in those rare cases where irreparable harm is truly threatened, an immediate appeal might be available through certification pursuant to section 1292(b) or, possibly, through a writ of mandamus. See Note, The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts, 45 U. Chi. L. Rev. 450, 468-80 (1978) (hereafter referred to as Chicago Note). Finally, it should be remembered that the trial judge also retains power to protect the trial against taint, either through the issuance

of protective orders or, if necessary, through reconsideration of the need for disqualification.[10]

Similarly, we now think that *Silver Chrysler* misconstrued the third *Cohen* requirement that the issue to be "too important to be denied review" by an immediate appeal. *Cohen* dealt with the legal issue whether defendants in stockholder derivative actions had the right to require plaintiffs to post security for costs; the Court, however, specifically noted that its decision did not mean that "every order fixing security is subject to appeal." 337 U.S. at 547. Thus, the *Cohen* exception to the final judgment rule appears to have been primarily, though perhaps not exclusively, directed towards interlocutory appeals raising potentially decisive legal, as opposed to factual, questions.[11] In con-

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[10] Of course, our discussion of the potential harm to a party whose disqualification motion is denied assumes that the denial was erroneous. In an analogous situation, however, we have stressed that a significant safeguard against irreparable harm to the parties is the "wise discretion of experienced trial judges." American Express, supra 380 F.2d at 282.

[11] While the issue is perhaps not settled, we disagree with Judge Mulligan's conclusion that the legal significance of the issues sought to be raised on appeal is not relevant to a determination of whether an order is appealable under *Cohen*. As noted in the text, the language of *Cohen* clearly implies that such a factor should be considered. Moreover, at least half the circuits have joined this court in construing *Cohen* generally to require consideration of the legal and public significance of the issues raised by the district court's order. See, e.g., Steering Comm. v. Mead Corp., 611 F.2d 86, 87 (5th Cir. 1980); Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1124 (10th Cir.), cert. denied, 100 S.Ct. 530 (1979); First Wisconsin Mortgage Trust v. First Wisonsin Corp., 571 F.2d 390, 393 (7th Cir.), rev'd en banc on other grounds, 584 F.2d 201 (1978); Van-S-Aviation Corp. v. Piper Aircraft Corp., 551 F.2d 213, 217 (8th Cir. 1977); Grinnell Corp. v. Hackett, 519 F.2d 595, 597-98 & n.4 (1st Cir.) (criticizing *Silver Chrysler* on this ground), cert. denied sub nom.

trast, most disqualification motions involve primarily factual, rather than legal, determinations, e.g., is there a threat of taint; is the screening adequate; is there a "substantial relationship" between prior and present representations. Such determinations therefore do not usually present "serious and unsettled question[s]" within the meaning of *Cohen*. 337 U.S. at 547. Cf. Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972); Donlon Industries, Inc. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968). Furthermore, in disqualification cases that do raise important and unresolved legal issues immediate review under section 1292(b) or by mandamus might be available.[12] See Community Broadcasting of Boston, Inc. v. F.C.C., 546 F.2d 1022, 1028 & n.40 (D.C. Cir.

Chamber of Commerce v. United Steelworkers of America, 423 U.S. 1033 (1975). See also 9 Moore's Federal Practice ¶ 110.10 (2d ed. 1975); Chicago Note, supra, at 461-64. And while it is of course true that the *Cohen* rule has been applied to permit immediate appeals from some orders involving primarily factual as opposed to legal issues, such cases often involve the threatened destruction of very important, and in some cases constitutional, rights. See, e.g., Abney v. United States, 431 U.S. 651, 656-62 (1977) (double jeopardy claim); Stack v. Boyle, 342 U.S. 1, 6-7 (1951) (order refusing to reduce bail); Roberts v. United States District Court, 339 U.S. 844 (1950) (order denying leave to proceed in forma pauperis). In such circumstances, the threat of irreparable harm alone is sufficient to justify the right to an immediate appeal. However, in cases such as this, where the likelihood of irreparable harm is hardly so certain, a court in considering the question of appealability should also give attention to the importance of the legal issues being raised.

12 In this regard, it is important to note that the certification procedure now embodied in 28 U.S.C. § 1291(b) was not available at the time of the *Cohen* decision.

It should also be remembered that special rules govern appealability in bankruptcy proceedings, the category of cases which appear to be of paritcular concern to Judge Mulligan. See, e.g., In re Arlan's Department Stores, Inc., 615 F.2d 925 (2d Cir. 1979).

1976). Finally, we do not think that the public importance of the ethical questions raised by disqualification motions requires the right to an immediate appeal. The normal appellate process, coupled with the judicious use of certification and mandamus, is perfectly adequate to vindicate this interest, as it has been held to be in the related, but more serious, situation when a district judge has denied a motion for his recusal. See *Rosen*, supra, 357 F.2d 794.

Thus, because we conclude that the requirements of *Cohen* are not met, we overrule *Silver Chrysler* and hold that orders denying disqualification motions are not immediately appealable.[13] We realize that in doing so we

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[13] In concluding that orders denying disqualification motions are not immediately appealable under *Cohen*, we have considered and rejected the rule of apparently limited appealability suggested in Judge Mulligan's dissent on this issue. Under this constricted reading of *Silver Chrysler*, only those orders denying disqualification that "involv[e] the integrity of the trial" are immediately appealable. Slip op. at ——. We regard this approach to jurisdiction, however, as vague and unworkable. Such a rule would necessarily involve a detailed examination of the merits of each appeal in order to determine whether the threshold criterion of appealability—a possible threat to the integrity of the trial—is present. Moreover, the inquiry to determine jurisdiction would duplicate the inquiry necessary to resolve the issue on the merits under the substantive standards of this court. See section IV infra. Judge Mulligan's dissent asserts that such careful scrutiny is unnecessary and that a cursory "consideration of which Disciplinary Rule is implicated" will generally suffice to screen out improper appeals. Slip. op. at —— no.3. We are unpersuaded, however, for several reasons. Claims of unethical conduct are varied and often complex, and the extent to which such allegations, if true, implicate the integrity of the trial simply cannot be accurately determined by a mechanical reference to which Disciplinary Rules are mentioned in appellant's brief. Moreover, we, should not underestimate the ability of the "artful movant . . . to fore unwarranted expenditure of judicial and opponent resources" by casting his appeal in terms of threat of taint where more exists. Chicago Note, supra, at 467-68. And when an appellant does so argue, in the face of a contrary ruling by the district court,

part company with several circuits that have accepted the *Silver Chrysler* rule. See, e.g., Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975). However, we are more persuaded by the arguments against the *Silver Chrysler* rule raised by other courts, see, e.g., In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (8th Cir.) (en banc), cert. granted sub nom. Firestone Tire & Rubber Co. v. Risjord, 48 U.S.L.W. 3726 (U.S. May 13, 1980);[14] Melamed v. ITT Continental Banking Co., 592

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this court would be faced with two equally unattractive options in making the necessary preliminary determination on the merits to decide whether jurisdiction exists to determine the merits: either devote much time and effort to deciding appealability or adopt a lax approach to the issue. Thus, the proposed rule would either pose major administrative problems or be an ineffective bar to frivolous appeals.

The present case, if anything, proves the point. Appellants vigorously urge taint, claiming that the use of screening is improper in this case, that the screening has already been violated, and that the trial will be tainted if the Gordon firm continues as the receiver's counsel. The district court, after a careful analysis, rejected appellant's claim that the integrity of the trial was threatened, and the panel of this court that originally heard the appeal did not disturb that finding. Judge Newman, the author of that panel opinion, now believes that a threat of taint may exist, slip op. at ——, but a majority of the en banc court has concluded that the district court correctly found that the integrity of the trial was not threatened. Thus, after full consideration by the district court, the panel, and the en banc court, there is still disagreement over whether a threat of taint exists, can it reasonably be assumed that examination of the question of taint for the purposes of ascertaining jurisdiction will prove a simpler and more straightforward task? We think not, and instead believe that the test of jursidiction should be less elusive.

[14] Certiorari was granted in *Firestone Tire* after the en banc order in this case had been issued and the so-proposed en banc majority opinion had been circulated. Since seven of the nine active judges considering this en banc appeal do not approve of the rule of appealability announced in *Silver Chrysler*, we believe that we should make known our current view.

F.2d 290 (6th Cir. 1970); Community Broadcasting, supra, 546 F.2d 1022, and by such commentators as Professor Moore. See 9 Moore's Federal Practice, ¶ 110.13[10] at p. 190 (2d ed. 1975) (approving 2d Circuit pre-*Silver Chrysler* rule).

We do not reach the same conclusion, however, with respect to orders *granting* disqualification motions. In such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew. Such considerations are obviously pertinent, for example, in this case. See notes 2-3 and accompanying text supra. Furthermore, the granting of a disqualification motion by a district judge is a fair indication that a nonfrivolous issue has been raised; there is no similar assurance that appeals from denials of disqualification motions will raise a substantial question. Thus, it is far less likely that appeals from orders granting disqualification motions will be taken purely for tactical reasons. Finally, disqualification ofter impairs the reputation of the disqualified firm or attorney, and this injury may never be corrected on appeal if the party is satisfied with the performance of his new counsel. For all these reasons, we now

agree with then Chief Judge Clark's view, expressed well before *Silver Chrysler,* that grants of disqualification motions are more important and potentially more harmful than denials of such motions and should therefore be immediately appealable as a matter of right. See Fleischer v. Phillips, supra, 264 F.2d at 517.[15]

III. *Advisability of reaching merits*

Since we conclude that orders denying disqualification motions are not immediately appealable, it would ordinarily be appropriate for us merely to dismiss the appeal in this case and allow the litigation to continue in the district court to its conclusion. At that time, of course, the defendants could appeal any adverse judgment to this court and could raise, among other things, the argument that Judge Werker's failure to disqualify the Gordon firm prejudiced them and that therefore the judgment should be reversed. Nevertheless, we believe there are strong reasons in the unusual context of this case to reach the merits of the appeal rather than to dismiss it.

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[15] We recognize the force of Judge Mulligan's claim that some inconsistency exists between our conclusion that denials of disqualification motions are not immediately appealable while grants of such motions are. However, legal rules do not depend on logic alone. The final judgment rule embodied in 28 U.S.C. § 1291 should be given a "practical rather than technical construction," Cohen, supra, 337 U.S. at 546, and, as we have noted, the practical consequences of granting a disqualification motion are sufficiently more serious and final than those stemming from the denial of such a motion that the right of an immediate appeal in the former case is justified. Thus, along with all the other circuits that have held denials of disqualification motions not to be immediately appealable, we are willing to endure whatever appearance of inconsistency arises from an opposite conclusion regarding the appealability of grants of disqualification motions.

We note, to begin with, that in In re Multi-Piece Rim Products Liability Litigation, supra, 612 F.2d at 379, and in Melamed v. ITT Continental Baking Co., supra, 592 F.2d at 295, the Eighth and Sixth Circuits both held denials of disqualification motions to be nonappealable but nonetheless decided the merits of the appeals before them. Moreover, given the procedural posture of this case, there are particularly compelling reasons to reach the merits. First, a refusal to do so will leave the law of the circuit on attorney disqualifications in a mudled state. Although the effect of our en banc decision will be to vacate the panel's earlier decision in this case, the panel's opinion will nonetheless suggest that this circuit is split on the applicable standard for disqualification motions, particularly when the panel decision is read in conjunction with Board of Education v. Nyquist, 590 F.2d 1241 (2d Cir. 1979). In addition, if we hold denials of such motions to be nonappealable but do not resolve the substantive question here presented, we shall effectively cut the district courts adrift, with no clarification of the law of the circuit, and a greatly diminished opportunity in the future to obtain necessary guidance. Moreover, failure to reach the merits will leave the district court supervising this litigation in a particularly untenable position; it must either adhere to its original ruling and proceed with a law firm that a panel of this court has said should not be in the case, or it must rescind its prior ruling and disqualify the firm, thereby precipitating another pretrial appeal, which might well result in reversal by a different panel. Finally, it would be an enormous waste of judicial resources simply to dismiss the appeal, now that all judges of the court have had an opportunity to consider the merits and defendants will undoubtedly appeal the identical issue if they are unsuccessful at trial.

Accordingly, we conclude that we should address the merits of the appeal before us.

IV. *The Merits*

In his thorough opinion refusing to disqualify the Gordon firm, Judge Werker reviewed the facts set forth in Part I of this opinion and carefully analyzed the ethical problem defendants had raised. He noted that Altman was concededly disqualified from participating in the litigation under Disciplinary Rule 9-101(B) of the American Bar Association Code of Professional Responsibility. That Rule prohibits an attorney's private employment in any matter in which he has had substantial responsibility during prior public employment.[16] The judge then considered the effect of Disciplinary Rule 5-105(D), which deals with disqualification of an entire law firm if one lawyer in the firm is disqualified.[17] This issue had been considered by both the American Bar Association (the ABA) and the Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York (the Association). The ABA, in its Formal Opinion No. 342, had recognized that "[p]ast government employment creates an unusual situation in which an inflexible application of D.R. 5-105(D) would actually thwart the policy considerations underlying

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16 Disciplinary Rule 9-101(B) provides:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

17 Disciplinary Rule 5-105(D) provides:

> If a lawyer is required to decline employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

D.R. 9-101(B)," 62 ABA Journal 517, 520 (1976), and concluded that, absent an appearance of significant impropriety, a government agency could waive Rule 5-105(D), if adequate screening procedures effectively isolated the former government lawyer from those members of his firm handling the matter. Id. at 521. The Association similarly rejected an absolute rule of disqualification for a law firm because of disqualification of a former government attorney, if the latter is "effectively isolated from the handling of [the] matter." Opinion No. 889, 31 The Record 552, 566 (1976).

Judge Werker then carefully examined the screening of Altman by the Gordon firm, noting that:

> Altman is excluded from participation in the action, has no access to relevant files and derives no remuneration from funds obtained by the firm from prosecuting this action. No one at the firm is permitted to discuss the matter in his presence or allow him to view any document related to this litigation, and Altman has not imparted any information concerning Growth Fund to the firm.
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> . . . .
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> [N]othing before this court indicates that Altman, while employed by the SEC, formed an intent to prosecute a later action involving Growth Fund. Indeed, sworn affidavits reveal that he has never participated in any fashion whatever in the Gordon firm's representation of the Receiver, nor has he shared in the firm's income derived from prosecution of this action. And . . . Altman and his two partners Velie and Butowsky have attested under penalty of perjury that Altman has never discussed

> the action with other firm members. These statements are uncontradicted by defendants and provide a basis for *not* imputing Altman's knowledge to other members of the firm.

461 F. Supp. at 624-25 (emphasis in original). Under all the circumstances, the district judge concluded that "the proper screening of Altman rather than disqualification of the Gordon firm is the solution to the present dispute." Id. at 626. Accordingly, the motion to disqualify was denied. On appeal, as already indicated, a panel of this court reversed the order of the district court, apparently on the ground that disqualification was required "as a prophylactic measure to guard against misuse of authority by government lawyers." 606 F.2d at 34.

On this rehearing en banc, we are favored with briefs not only from the parties but also from the United States,[18] the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Maritime Commission, the Commodities Futures Trading Commission and twenty-six distinguished former government lawyers now employed as practicing attorneys, corporate officers, or law professors, all attesting to the importance of the issues raised on appeal. Thus, the United States asserts that a "decision to reject screening procedures is certain to have a serious, adverse effect on the ability of Government legal offices to recruit and retain well-qualified attorneys"; this view

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[18] The brief of the United States also states that is presents the views of the Federal Trade Commission, the Civil Aeronautics Board, the Federal Energy Regulatory Commission, and the Federal Legal Council, a committee consisting of the General Counsels of fifteen executive branch agencies and chaired by the Attorney General of the United States.

is seconded by the other government amici. And the former government lawyers, including two former Attorneys General of the United States and two former Solicitors General of the United States, state that they are all "affected at least indirectly, by the panel opinion's underlying assumption that government lawyers cannot be trusted—trusted to discharge their public responsibilities faithfully while in office, or to abide fully by screening procedures afterwards." While the tone of these assertions may be overly apocalyptic, it is true that a decision rejecting the efficacy of screening procedures in this context may have significant adverse consequences. Thus, such disapproval may hamper the government's efforts to hire qualified attorneys; the latter may fear that government service will transform them into legal "Typhoid Marys," [19] shunned by prospective private employers because hiring them may result in the disqualification of an entire firm in a possibly wide range of cases. The amici also contend that those already employed by the government may be unwilling to assume positions of greater responsibility within the government that might serve to heighten their undesirability to future private employers. Certainly such trends, if carried to an extreme, may ultimately affect adversely the quality of the services of government attorneys.

Not only is the panel decision possibly of great practical importance; the ethical issues it addresses are also complex and are currently being hotly contested by various groups. As previously noted, the ABA in its Formal Opinion No. 342 and the Association of the Bar of the City of New York both approved the use of screening devices in the case of

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[19] Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam).

former government attorneys; the Administrative Conference of the United States has also recently sanctioned the use of screening.[20] In contrast, an ABA committee in a recent draft proposal for Model Rules of Professional Conduct apparently omits any provision for relief from disqualification through screening.[21] The issues thus raised have also provoked significant scholarly commentary. See, e.g., Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957); Lacovara, Restricting the Private Practice of Former Government Lawyers, 20 Ariz. L. Rev. 369 (1978); Note, The Chinese Wall Defense of Law Firm Disqualification, 128 U. Penn. L. Rev. 677 (1980) and commentry collected at nn.9 & 16 [hereafter referred to as Pennsylvania Note]; Note, Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification, 1977 Duke L. J. 512; Comment, Conflicts of Interest and the Former Government Attorney, 65 Geo. L. J. 1025 (1977).

We do not believe that it is necessary or appropriate for this court to enter fully into the fray, as the panel opinion did.[22] Indeed, the current uncertainty over what

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20 See Administrative Conference of the United States, Recommendation 79-7 (Dec. 14, 1979), reprinted in Legal Times of Washington, Dec. 31, 1979, at 27.

21 ABA Commission on Evaluation of Professional Standards, Discussion Draft of the Model Rules of Professional Conduct § 1.11 (Jan. 30, 1980), reprinted in U.S.L.W., vol. 48, no. 32 (Feb. 19, 1980).

22 Judge Newman, dissenting from this portion of the en banc opinion, aserts that the present provisions of the Code of Professional Responsibility should be "appl[ied] as written." Slip op. at——. We regard this "plain meaning" approach to disqualification motions to be particularly ill-advised in light of the continuing uncertainty and disagreement over the meaning and application of the Code's provisions.

is "ethical" underscores for us the wisdom, when considering such issues, of adopting a restrained approach that focuses primarily on preserving the integrity of the trial process. We expressed this view in Board of Education v. Nyquist, 590 F.2d 1241 (2d Cir. 1979), in which we reviewed at length our precedents on attorney disqualification and pointed out:

> Our reading of the cases in this circuit suggests that we have utilized the power of trial judges to disqualify counsel where necessary to preserve the integrity of the adversary process in actions before them. In other words, with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interest in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, . . . or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage . . . . But in other kinds of cases, we have shown considerable reluctance to disqualify attorneys despite misgivings about the attorney's conduct . . . . This reluctance probably derives from the fact that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons . . . . And even when made in the best of faith, such motions inevitably cause delay.

Id. at 1246 (citations and footnotes omitted). Judge Mansfield, concurring in *Nyquist,* pointed out that a trial could also be tainted because:

> . . . the former Government attorney might in the later private action use information with respect to the matter in issue which was gained in confidence as a public employee and was unavailable to the other side.

Id. at 1247 n.1. We ended our review in *Nyquist* by adopting a restrained approach to disqualification.

> Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney's conduct tends to "taint the underlying trial" . . . by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery, see, e.g., Local Rules of the United States Court of Appeals for the Second Circuit § 46(h) (1978), there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface. See Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1141 (2d Cir. 1975); Ceramco, Inc. v. Lee Pharmaceuticals, supra, 510 F.2d at 271. Cf. United States v. Pastore, 537 F.2d 675 (2d Cir. 1976).

Id. at 1246 (citation omitted).

We believe that this approach is dispositive here and requires our affirmance of the ruling of the district court. It is apparent from a close reading of Judge Werker's opinion that he saw no threat of taint of the trial by the

Gordon firm's continued representation of the receiver. Nor did the panel opinion in this case challenge that view. Although appellants assert that the trial will be tainted by the use of information from Altman, we see no basis on the record before us for overruling the district court's rejection of that claim.[23] Using the *Nyquist* analysis, there is certainly no reason to fear any lack of "vigor" by the Gordon firm in representing the receiver, this is not a case where a law firm, by use of a "Chinese wall," is attempting to justify representation of conflicting interests at the same time. Cf. Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977); Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976). See also, Pennsylvania Note, supra, at 684-85, 687-91, 715. Nor is the Gordon firm "potentially in a position to use privileged information" obtained through prior representation of the other side. And finally, the receiver will not be making unfair use of information obtained by Altman as a government official, since the SEC files were turned over to the receiver long before he retained the Gordon firm and Altman has been entirely screened from all participation in the case, to the satisfaction of the district court and the SEC.[24] Nor is there any reason to believe

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[23] Judge Newman, author of the panel opinion, now asserts that the trial may be tainted if the Gordon firm continues as receiver's counsel. However, as we state in the text, we perceive no basis in the record for overruling the district court on this issue.

[24] The case therefore is entirely distinguishable from General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974), where an attorney who had substantial responsibility over an antitrust litigation against General Motors Corporation while he was employed by the Antitrust Division of the Justice Department later accepted employment as plaintiff's attorney in a private antitrust action against the same defendant for substantially the same conduct.

that the receiver retained the Gordon firm because Altman was connected with it[25] or that Altman had anything to do with the retention. If anything, the presence of Altman as an associate at that time was a problem, not a benefit, for the Gordon firm, as the district court, the receiver and the Gordon firm all apparently recognized.

Thus, because the district court justifiably held that the Gordon firm's representation of the receiver posed no threat to the integrity of the trial process, disqualification of the firm can only be based on the possible appearance of impropriety stemming from Altman's association with the firm. However, as previously noted, reasonable minds may and do differ on the ethical propriety of screening in this context. But there can be no doubt that disqualification of the Gordon firm will have serious consequences for this litigation; separating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart, his attempt to obtain redress for defendant's alleged frauds. Under the circumstances, the possible "appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where . . . the appearance of impropriety is not very clear." *Nyquist, supra,* 590 F.2d at 1247. Thus, we need not resolve the ethical propriety of the screening procedure used here at this time as long as the district court justifiably regarded it as effective in isolating Altman from the litigation.

We recognize that a rule that concentrates on the threat of taint fails to correct all possible ethical conflicts. In adopting this approach, we do not denigrate the importance of ethical conduct by attorneys practicing in this courthouse

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[25] Altman was then an associate, although he is now a partner.

or elsewhere, and we applaud the efforts of the organized bar to educate its members as to their ethical obligations. However, absent a threat of taint to the trial, we continue to believe that possible ethical conflicts surfacing during a litigation are generally better addressed by the "comprehensive disciplinary machinery" of the state and federal bar, see *Nyquist,* supra, 590 F.2d at 1246,[26] or possibly by legislation.[27] While there may be unusual situations where the "appearance of impropriety" alone is sufficient to warrant disqualification, we are satisfied that this is not such a case. Nor do we believe, as Judge Newman asserts, that a failure to disqualify the Gordon firm based on the possible appearance of impropriety will contribute to the "public skepticism about lawyers." While sensitive to the integrity of the bar, the public is also rightly concerned about the fairness and efficiency of the judicial process. We believe those concerns would be disserved by an order of disqualification in a case such as this, where no threat of taint exists and where appellants' motion to disqualify opposing counsel has successfully crippled the efforts of a receiver, appointed at the request of a public agency, to obtain redress for alleged serious frauds on the investing public. Thus, rather

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[26] The Reporter for the ABA Committee that drafted the Code of Professional Responsibility recently noted that the Code's Disciplinary Rules were drafted for use in disciplinary proceedings and were not intended to be used as rules governing disqualification motions. Sutton, How Vulnerable Is the Code of Professional Responsibility?, 57 N.C.L. Rev. 497, 514-16 (1979). The Code nevertheless will continue to provide guidance for the courts in determining whether a case would be tainted by the participation of an attorney or a firm. See Fund of Funds, supra, 567 F.2d at 227 n.2; NCK Organization, Ltd. v. Bregman, 542 F.2d 128, 129 n.2 (2d Cir. 1976).

[27] Cf. 18 U.S.C. § 207.

than heightening public skepticism, we believe that the restrained approach this court had adopted towards attempts to disqualify opposing counsel on ethical grounds avoids unnecessary and unseemly delay and reinforces public confidence in the fairness of the judicial process.

Accordingly, we vacate the panel opinion in this case and affirm the judgment of the district court.

MULLIGAN, Circuit Judge, concurring in part and dissenting in part.

I concur in that part of the majority opinion which holds that no attorney disqualification was required in this case but I respectfully dissent from the majority's overruling *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc).

The position of this court on this subject has been one of tergiversation. In *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956), reh. den., 241 F.2d 937 (2d Cir. 1977), cert. denied, 355 U.S. 824 (1957) Judge Swann, with the concurrence of Judge Learned Hand (Clark, C.J., dissenting), held that denials of motions to disqualify counsel fall within the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Harmar* was implicitly overruled by *Fleischer* v. *Phillips*, 264 F.2d 515 (2d Cir. 1959), cert. denied, 359 U.S. 1002 (1959) but was resurrected by our unanimous decision en banc in *Silver Chrysler* in 1974. Today we inter *Silver Chrysler* but I refuse to participate in the sepulture.

In addition to our own agonizing over this problem, the

conflict of opinion among the circuits [1] attests to the difficulties which are inherent in reaching a solution. The issue is whether or not the denial of a motion to disqualify counsel is appealable within the so-called "collateral order" exception to the final judgment rule first announced in *Cohen.* My disagreement with the majority is based upon several of its premises.

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[1] Interlocutory appeals of denials of disqualification are permitted under *Cohen* in five circuits: the Third Circuit, *see Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3d Cir. 1977); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), cert. denied, 429 U.S. 830 (1976); *Greene* v. *Singer Co.*, 509 F.2d 750 (3d Cir. 1971), cert. denied, 409 U.S. 848 (1972) (adopting a case-by-case approach to appealability); the Fourth Circuit, *see Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197 (4th Cir.), cert. denied, 439 U.S. 821 (1978) (grants of disqualification also appealable); *MacKethan v. Peat, Marwick, Mitchell & Co.*, 557 F.2d 395 (4th Cir. 1977) (per curiam); the Fifth Circuit, *see Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp.*, 563 F.2d 671 (5th Cir. 1977); the Seventh Circuit, *see In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978); and the Tenth Circuit, *see State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1978); *Fullmer v. Harper*, 517 F.2d 20 (10th Cir. 1975).

The Sixth Circuit has recently held that:

> "where a District Court has heard a motion to disqualify an opposing party's counsel, has denied said motion on the merits after [sic] evidentiary hearing, and has (as here) entered a finding to the effect that the moving party cannot be injured by the challenged representation,"

it will dismiss appeals from denials of disqualification. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979) (motion to disqualify based on prior representation of a competitor). See also *General Electric Co. v. Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979), cert. denied, 100 S.Ct. 1318 (1980). Although the court in *Melamed* considered itself to be departing from *Silver Chrysler, Melamed v. I.T.T. Continental Baking Co., supra* at 295, the rule announced in *Melamed* seems identical to

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The majority has the clear impression that the availability of an immediate appeal has contributed to the proliferation of disqualification motions and the use of such motions for delay and other purely tactical purposes. The only available evidence on this question is the opinions which this court has issued in response to interlocutory appeals under *Silver Chrysler*. It seems there have been eleven such opinions. In six of these we affirmed the court below. I cannot characterize this as a serious problem of calendar congestion. The majority contends that a prior ruling in favor of disqualification will give some assurance that appeals of grants of disqualification raise nonfrivolous issues, but that "there is no similar assurance that appeals from denials of disqualification motions will raise a substantial question." (maj. op. p. 14) It should be noted, however, that the affirmance rates of the two categories of

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this court's clarification of *Silver Chrysler* in *W.T. Grant & Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976).

In addition to this court, three circuits now do not permit interlocutory appeals of denials of disqualification: the D.C. Circuit, *see Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (D.C. Cir. 1976); the Eighth Circuit, see *In re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377 (8th Cir. 1980), cert. granted sub nom. *Firestone Tire & Rubber Co. v. Risjord*, 48 U.S.L.W. 3726 (May 13, 1980); and the Ninth Circuit, see *Chugach Elec. Ass'n v. United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967) (stating that denials are not appealable but granting petition for mandamus without citing *Cohen*); *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), clarified, 370 F.2d 418 (1966) (stating that denials are not appealable without citing Cohen but granting petition for mandamus).

published opinions—appeals from grants and appeals from denials—are not significantly different.[2]

But more to the point, a proliferation of appeals, if such there be, has no logical bearing on the test set forth in *Cohen.* Appealability under *Cohen* does not depend upon the quantum of appellate business which might be generated by a holding in favor of appealability. This point was addressed recently in *Abney v. United States,* 431 U.S. 651, 662 n.7 (1977). There a unanimous Court held that pretrial orders rejecting claims of former jeopardy were final decisions within *Cohen* and thus immediately appealable. The Solicitor General had argued that such a holding might encourage dilatory appeals. Mr. Chief Justice Burger rejected this argument, noting that it is "well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy." *Id.*

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[2] The eleven appeals from denials of disqualification are *In the Matter of Bohack Corp.,* 607 F.2d 258 (2d Cir. 1979) (order denying disqualification reversed); *Armstrong v. McAlpin,* 606 F.2d 28 (2d Cir. 1979) (order denying disqualification reversed); *In re Hartford Textile Corp.,* 588 F.2d 872 (2d Cir. 1978) (per curiam) (order affirmed), cert. denied, 100 S.Ct. 473 (1979); *Fund of Funds, Ltd. v. Arthur Andersen & Co.,* 567 F.2d 225 (2d Cir. 1977) (order reversed); *Allegaert v. Perot,* 565 F.2d 246 (2d Cir. 1977) (order affirmed); *SEC* v. *Sloan,* 535 F.2d 679 (2d Cir. 1976) (per curiam) (order affirmed), cert. denied, 430 U.S. 966 (1977); *W.T. Grant & Co. v. Haines,* 531 F.2d 671 (2d Cir. 1976) (order affirmed); *Lefrak v. Arabian American Oil Co.,* 527 F.2d 1136 (2d Cir. 1976) (order affirmed); *J.P. Foley & Co. v. Vanderbilt,* 523 F.2d 1357 (2d Cir. 1975) (case remanded); *Ceramco, Inc. v. Lee Pharmaceuticals,* 510 F.2d 268 (2d Cir. 1975) (order affirmed); *General Motors Corp. v. City of New York,* 501 F.2d 639 (2d Cir. 1974) (order reversed). Counting the reversal in *Armstrong* which this court now vacates, six of eleven appeals from denials of disqualification resulted in affirmance.

Aside from this observation, in appeals from denials of disqualification we have the power to award counsel fees and costs, which provide ample sanctions against those whose intention is to create delay. *See, e.g.,* 28 U.S.C. §§ 1912, 1927 Fed.R.App.P. 38. I conclude that the majority has failed to provide any empirical support for the premise which it believes requires a reexamination of *Silver Chrysler* that conceptually this premise, even if true, is irrelevant; and that practically, if abuse occurs, there are means to curtail it better tailored to the abuse than the draconian alternative of denying all interlocutory appeals.

There are nine opinions arising from appeals of grants of disqualification. *United States v. Ostrer,* 597 F.2d 337 (2d Cir. 1979) (order granting disqualification affirmed); *Board of Education v. Nyquist,* 590 F.2d 1241 (2d Cir. 1979) (order reversed); *In re Taylor,* 567 F.2d 1183 (2d Cir. 1977) (order reversed and remanded as premature); *Government of India v. Cook Industries, Inc.,* 569 F.2d 737 (2d Cir. 1978) (order affirmed); *NCK Organization, Ltd. v. Bregman,* 542 F.2d 128 (2d Cir. 1976) (order affirmed); *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F.2d 1384 (2d Cir. 1976) (order affirmed); *International Electronics Corp. v. Flanzer,* 527 F.2d 1288 (2d Cir. 1975) (order reversed); *United States v. Armedo-Sarmiento,* 524 F.2d 591 (2d Cir. 1975) (order reversed); *Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975) (order affirmed). Five of nine appeals of grants of disqualification resulted in affirmance.

Any conclusions drawn from the above facts are obviously subject to several caveats. The sample may be too small to reveal a statistically significant difference. Grants of disqualification in criminal cases, see, e.g., *United States v. Armedo-Sarmiento, supra,* may result in a higher percentage of reversals because Sixth Amendment values are implicated, see *Faretta v. California,* 422 U.S. 806 (1975). That there are equal percentages of affirmances among published opinions does not necessarily imply that there are equal percentages of affirmances without opinions. Nevertheless, considering the information available to us, it is fair to say that the existence of roughly equivalent percentages of affirmances of grants and denials does not support the majority's premise.

II

Cohen established three criteria for determining when an order is a "final decision" under 28 U.S.C. § 1291. The order must (1) involve an important issue entirely collateral to the merits; (2) have been conclusively decided by the court below; and (3) be effectively unreviewable after final judgment. *Id.* at 546-47.

The majority concedes that rulings on disqualification motions are collateral within the meaning of *Cohen.* Nor is there any doubt that such orders are conclusive. Although the original dispute in this court over this question was framed in terms of finality, *compare Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., supra, with Fleischer v. Phillips,* 264 F.2d 1002 (2d Cir. 1959), it seems clear that such denials are no less conclusive than other orders which the Court has found appealable under *Cohen. See, e.g., Stack v. Boyle,* 342 U.S. 1 (1951) (motion for reduction of bail), *Abney v. United States,* 431 U.S. 651 (1977) (motion to dismiss on double jeopardy grounds). The facts which are relevant to a decision whether to disqualify will generally be fully available at the outset of litigation. There is no particular reason to anticipate a reversal of position by the district court.

The majority finds that denials of disqualification motions do not satisfy two aspects of the *Cohen* criteria. It argues that the harm caused by an erroneous denial of a disqualification motion is usually not irreparable because this court retains its traditional power to grant a new trial if the district court's ruling is found after final judgment to be incorect. (maj. op. p. 11) We respectfully disagree.

I do not read *Silver Chrysler* as the majority does, to permit appealabiiity in all cases where there has been a

denial of disqualification. We suggested in *Lefrak v. Arabian American Oil Co.*, 527 F.2d 1136, 1139-40 (2d Cir. 1975) and *W.T. Grant v. Haines*, 531 F.2d 671, 678 (2d Cir. 1976) that for an order to be appealable under *Silver Chrysler*, it is necessary that the issue appealed from relate to a taint of the trial. If issues not involving the integrity of the trial are involved, there should be no appeal under *Silver Chrysler*. *See, e.g., Lefrak v. Arabian American Oil Co., supra* (improper solicitation of a client); *W.T. Grant & Co. v. Haines, supra* (improper communication with an adverse party).[3] The ethical problems involved in such cases can be handled by a bar association grievance committee or by the courts in separate proceedings. Where there is a conflict of interest, however, and counsel sought to be disqualified is in possession of privileged information which may be utilized against a former client, I cannot agree that an appeal from the final judgment and the granting of a new trial protect the interests of the client, much less the public interest in the integrity of the judicial process. We have supported an order of disqualification,

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[3] This restriction on appealability does not involve this court in any elaborate consideration of the merits in order to determine appealability or in any elaborate factual inquiry such as that necessitated by the "death knell" approach to the appealability of class certification denials which was recently disapproved in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). In many cases it will involve little more than a consideration of which Disciplinary Rule is implicated. It is much more akin to the inquiry we must make in applying 28 U.S.C. § 1292(a)(1) which facially permits interlocutory appeals from orders refusing injunctions. In *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) the Court construed the section to be limited to those orders involving "serious, perhaps irreparable, consequences."

in the words of Chief Judge Kaufman, because "[t]he stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 575 (2d Cir. 1973). If on appeal from final judgment this court determines that counsel for the successful party had a conflict which contaminated the trial, the interests of the unsuccessful party are probably irremediably injured. The record has been made and it is a public record. The extent to which it has been poisoned by the use of privileged information may not be readily apparent. Retrial with new counsel becomes the empty ritual act which is characteristic of attempts to remedy the effects of erroneously decided *Cohen*-type orders after final judgment. *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 688-89 (1950). Moreover, the integrity of the judicial process has been sacrificed and that certainly is not redeemed by a second trial with qualified counsel. These are the elements of irreparable harm which are involved. The harm is not simply, as the majority would have it, the need "to bear the time and expense involved in a trial that may possibly be tainted." (maj. op. p. 11)

In urging that orders granting disqualification do involve irreparable harm and therefore are appealable under *Cohen*, the majority suggests that the trial will be delayed until new counsel is obtained, the client will be separated from counsel of his choice and counsel himself will be stigmatized. We are of course dealing with imponderables, but even assuming all of these eventualities, they are less weighty than those which may well afflict the litigant

forced to trial where his opponent is represented by an attorney who may have been privy to privileged information which can be now utilized against him.[4]

III

The majority also contends that *Silver Chrysler,* in permitting interlocutory appeals from orders denying disqualification, offended the *Cohen* requirement that the issue on appeal be "to important to be denied review." *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546. The majority reads *Cohen* to be directed to those interlocutory appeals "raising potentially decisive legal, as opposed to factual, questions. In contrast, most disqualification motions involve primarily factual, rather than legal determinations [which] do not present 'serious and unsettled question[s].'" (maj op. p. 12) Assuming this to be a correct analysis of *Cohen,* how then can the majority at the same time argue that orders granting disqualification are appealable under *Cohen?* There is no question that

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[4] We have, of course, noted our reluctance to separate a client from counsel of his choice and will not where the professional misconduct charged does not prejudice the opposing party or taint the litigation. *W.T. Grant & Co. v. Haines,* 531 F.2d 671 (2d Cir. 1976). However, where the conflict of interests exposes a former client to prejudice and this taints the trial, we have not hesitated to order disqualification. *In the Matter of Bohack,* 607 F.2d 258 (2d Cir. 1979). *See also Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975). In cases involving bankrupts or debtors-in-possession it has become routine to appoint prior counsel as counsel in the proceedings in bankruptcy. This creates a clear danger of conflict of interest. In *Bohack* we depended upon *Silver Chrysler* for appellate jurisdiction. Today's opinion is particularly regrettable in that it shields these cases for immediate review. The affront to the integrity of the judicial process is especially serious since appointment of counsel has been routinely approved by the bankruptcy court. See *In re Arlan's Department Stores, Inc.,* 615 F.2d 925 (2d Cir. 1979).

such orders are appealable as *Cohen* exceptions to 28 U.S.C. § 1291. *See Emle Industries, Inc. v. Patentex, Inc., supra,* at 570 n.5. Precisely the same factual and legal issues are involved whether the district court grants or denies the motion to disqualify. The majority cannot have it both ways. If, as my brothers contend, disqualification motions do not raise any potentially decisive legal issues in unsettled areas of the law then they cannot reasonably contend that orders granting disqualification are appealable under *Cohen.*

Whether *Cohen* does in fact require that the order sought to be appealed involve a serious legal question which has not been settled has not been as clear as a mountain lake in springtime. The statement of the *Cohen* criteria which we have recited above and which has been repeated in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978) and *Abney v. United States,* 431 U.S. 651, 658 (1977) simply provides that the issue be "important" or "too important to be denied review." The Court in *Cohen* did state that the issue in that case presented a serious and unsettled question. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. at 547. That this created a requirement beyond the normally stated criteria apparently was first suggested by Judge Friendly in *Donlon Industries, Inc. v. Forte,* 402 F.2d 935, 937 (2d Cir. 1968) and again in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l., Inc.,* 455 F.2d 770, 773 (2d Cir. 1972). It was applied also in *International Business Machines Corp. v. United States,* 480 F.2d 293, 298 (2d Cir. 1973) (en banc) (Mulligan, J.), cert. denied, 416 U.S. 980 (1974).

This so-called "public importance" gloss on *Cohen,* however, has not been applied consistently in this circuit. Thus it has been noted that "many collateral order cases, includ-

ing recent decisions from the Second Circuit, allow appeals that will not settle general questions, and that threaten to invite a large number of similar appeals. The recent ruling [citing *Silver Chrysler*] that orders *granting* or *denying* motions to disqualify counsel are appealable provides ample illustration" (emphasis supplied). *Wright, Miller & Cooper, Federal Practice and Procedure* § 3911 at 496. *See also* Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts,* 45 U.Chi. L.Rev. 450, 461 (1978).

Having found no post-*Cohen* Supreme Court authority which has turned upon this "public importance" factor or indeed has even mentioned it, I am now compelled to conclude that it is not a *Cohen* requirement. In *Abney v. United States, supra,* the Court held that there was a right to appeal from an order denying a motion to dismiss an indictment on double jeopardy grounds under *Cohen.* Whether or not double jeopardy applies in a particular case, however, will depend upon its facts. *Id.* at 664. It is now apparent that such orders are all within *Cohen* despite the fact that they will normally involve no unsettled issues of law on appeal but rather will primarily require a factual determination. The issue of whether a litigant should be required to go to trial where his opponent is represented by counsel who is privy to confidential and privileged information presents a serious issue too important to be denied review and is thus within *Cohen.* So long as the unethical conduct exposes the trial to taint there is a public as well as a private interest that this collateral matter be given prompt appellate review. Appeal from the denial of such disqualification presents an even stronger case for *Cohen* treatment than an order granting disqualification, which precludes any possibility of a tainted trial.

The suggestion that § 1292(b) certification or mandamus will adequately protect the party who has lost the motion to disqualify is not persuasive. If these were sufficient remedies then they would equally bar resort to *Cohen* where disqualification is ordered. Appeal under § 1292(b) requires certification by the district court that an order involves a controlling question of law. But the majority argues that this seldom occurs because cases such as the one which we have today decided on the merits involve primarily the application of facts to established law. *See also Trone v. Smith,* 553 F.2d 1207 (9th Cir. 1977) (§ 1292(b) is not a proper avenue for review of denials of disqualification). Mandamus provides even less assurance of protection. *Will v. United States,* 389 U.S. 90, 95 (1967) makes it plain that error, even gross error, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ.

For these reasons we should adhere to *Silver Chrysler.* In any event, if the majority is correct that the "public importance" factor is inherent in *Cohen,* then we must also refuse to hear appeals from motions granting disqualification. We conclude that it is not an inherent factor and that both the grant and the denial of disqualification motions are appealable under *Cohen.*

MESKILL, *Circuit Judge* (concurring in part and dissenting in part):

I concur in that part of the majority opinion which holds that no attorney disqualification was required, but dissent from the overruling of *Silver Chrysler* and concur in Judge Mulligan's separate opinion.

VAN GRAAFEILAND *Circuit Judge,* concurring in part and dissenting in part:

The refusal of a district court to disqualify counsel leaves neither court nor opponent without remedy. The court may order disqualification at any later time if subsequent events make it appropriate. Disbarment, *see United States* v. *Costen,* 38 F. 24 (C.C.D. Colo. 1889), reversal, *see United States* v. *Bishop,* 90 F.2d 65 (6th Cir. 1937), injunctive protection, *see United States* v. *Mahaney,* 27 F. Supp. 463 (N.D. Cal. 1939), and denial of compensation, *see Gessellschaft Fur Drahtlose Telegraphie M.B.H.* v. *Brown,* 78 F.2d 410 (D.C. Cir.), *cert. denied,* 296 U.S. 618 (1935), are also available remedies. I agree, therefore, that the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) does not give this Court jurisdiction to hear appeals of this nature. Because the provisions of the Code of Professional Responsibility are presently in a state of flux, [1] and we shed little permanent light by our discussion of the merits, I would simply dismiss the instant appeal for lack of jurisdiction.

NEWMAN, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority's conclusions that orders denying disqualification are not reviewable on an interlocutory

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[1] A Discussion Draft of the Model Rules of Professional Conduct is presently being circulated by the American Bar Association and a final version of the Rules will be submitted to the House of Delegates at its February 1981 meeting.

appeal[1] and that this ruling on appealability should be given only prospective effect; on the merits, however, I respectfully dissent.

The majority's opinion does not deal with the ultimate issue on the merits: whether a law firm's representation violates Disciplinary Rule 5-105(D) when one of its partners is disqualified under Disciplinary Rule 9-101(B). Instead the majority concludes that, whether or not the firm's representation violates the Code of Professional Responsibility, a trial court should not disqualify the firm unless (a) the firm's representation would taint the trial or (b) the case is one of those "unusual situations where the 'appearance of impropriety' alone is sufficient to warrant disqualification." —— F.2d at ——. In this case the majority finds neither a threat of taint nor a sufficient basis to disqualify to avoid the appearance of impropriety. I disagree with both this standard for disqualification and its application to this case.

As expressed by the majority, this standard makes trial taint the primary and nearly exclusive basis for disqualification, relegating "appearance of impropriety" to a remote

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[1] My conclusion that orders denying disqualification are not within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), rests entirely on the failure to meet *Cohen's* requirement that review after final judgment will be ineffective. I do not agree with the suggestion in the majority opinion that *Cohen's* requirement of an issue "too important" to be deferred encompasses only decisive legal questions and not the application of settled legal rules to particular facts. As Judge Mulligan points out, supra at ——, this limitation would preclude interlocutory review of most orders *granting* disqualification. "Importance" relates to the consequences to the parties (or their lawyer), not to whether the issue has public significance.

and uncertain role at best.[2] In my view, the judiciary should be much more willing to use the sanction of disqualification to make sure that the canons of ethics are not violated in the court room. I can agree that not every violation of the Code should result in disqualification. Especially when a violation occurs after litigation has begun, it will sometimes be fairer to the interests of both the public and the client to permit the trial to continue to conclusion and then use the grievance procedures for appropriate discipline. But when the alleged violation concerns the propriety of undertaking representation at the outset, a court should inquire into whether a lawyer and his firm are violating the Code by appearing in the litigation, whether or not such representation will taint the trial.[3]

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[2] Limiting disqualification to instances of trial taint may have been somewhat more justified prior to today's decision, when denials of disqualification were subject to interlocutory appeal. It may be that fear of dilatory interlocutory appeals played some part in the emergence of the "trial taint" standard, limiting the grounds for court-enforced disqualification. It is somewhat ironic that a "trial taint" standard should now become virtually absolute at the very time that interlocutory appeals from denial of disqualification are being prohibited.

[3] It is clear that trial courts could appropriately enforce, at the outset of litigation, disqualification rules that are not concerned only with trial taint. However, such an approach would pose different issues for an appellate court considering a trial court's denial of disqualification on appeal from a final judgment after trial. At that point reversal of the judgment might sometimes be an excessive penalty for violation of the canons, too costly to both the litigants and the public. Perhaps the penalty for representation in violation of the canons, where trial taint has not occurred should be simply forfeiture of attorney's fees. Even if reversal of a judgment were inappropriate, appellate rulings on whether the representation was proper would increase observance of the canons and provide useful guidance for trial courts. Whatever sanctions might be appropriate for an appellate court to impose when, after judgment, denial of disqualification is held to have been erroneous, the disqualification sanction, not limited to instances of trial taint, should be available for use by trial courts when the canons are violated at the outset of litigation.

The appropriateness of such inquiry is especially high when the Code provision at issue regulates the ethical conduct of government attorneys. DR 9-101(B) is not concerned solely with the trial taint that may occur if an attorney handles a matter for which he previously had substantial responsibility as a government lawyer. It also seeks to avoid "the manifest possibility that . . . [a former Government lawyer's] action as a public legal officer might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done." *General Motors Corp.* v. *City of New York,* 501 F.2d 639, 648-49 (2d Cir. 1974). Courts traditionally have been most sensitive to the enforcement of standards designed to limit governmental power. They should be at least as sensitive to the enforcement of standards specifically designed to protect against the misuse of such power. The purposes of DR 9-101(B) cannot be fully achieved unless there is no possibility that the government attorney can be (or seem to be) influenced by the prospect of later private employment. To remove that possibility requires disqualification not only of the attorney, when handling a related matter, but also of his firm.[4]

Even under the majority's limited standard for disqualification, Altman's firm should be disqualified in this case. First, if threat of taint is accepted as the primary ground for disqualification, such threat is present here. In *Board of Education* v. *Nyquist,* 590 F.2d 1241 (2d Cir.

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[4] In this case there is no reason to doubt that Altman acted fairly and uprightly as a government attorney. But the canons of ethics, it has been properly pointed out, are designed as guidance for the honorable attorney, not simply as a proscription against misconduct. *General Motors, supra,* 501 F.2d at 649.

1979), it was recognized that a former Government attorney's possession of confidential information unavailable to the other side would risk trial taint sufficiently to warrant his disqualification. *Id.* at 1247-48 n.1 (Mansfield, J., concurring). That risk is not eliminated by screening the lawyer from his firm. In *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 229 n.10 (2d Cir. 1977), a Chinese Wall within a law firm was thought to be inadequate protection against the risk that information from one of the firm's clients, with interests adverse to another of the firm's clients, would be transmitted from one partner to another. If in this litigation it should become crucial to the outcome for the lawyers representing the plaintiff to know some confidential information learned by Altman while in government employ, I do not see why a Chinese Wall should be thought more impervious to information that originated from a government investigation than to information learned from a client with adverse interests.[5]

Second, this case should be deemed to meet the majority's exception to the taint standard for an unusual situation where the appearance of impropriety warrants disqualification. In addition to the need to disqualify the firm to avoid all risk that a government attorney might misuse his authority in hope of later private gain, appearance of

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[5] The majority opinion suggests that the absence of risk of taint is a factual finding of the District Court, not shown to be clearly erroneous. I would agree that whether a Chinese Wall within a law firm has been breached would be an issue of fact. However, whether such a device is prospectively a suffiicent safeguard to justify a representation forbidden by the Code is an issue of law. That issue was not considered in the panel opinion because disqualification of the firm was thought to be required by the Code and the principle of the *General Motors* case, regardless of whether a Chinese Wall could adequately prevent taint.

impropriety exists here because of the further risk that the screening procedure will not be effective. It may well be that no matter how this litigation develops, Altman will in fact not disclose to his partners anything he learned while exercising substantial government responsibilities for related matters. But the public will not believe it. Of course, the rules of law, including the rules of disqualification, cannot cater to all the often unfounded apprehensions of the public. But we do not deal here with just a generalized public skepticism about lawyers. The policy-making body of the legal profession's largest and most influential membership organization has adopted a Code of Professional Responsibility that bars Altman from representing the plaintiff in this case (DR 9-101(B)) and bars his partners as well (DR 5-101(D)). The public understandably will see an appearance of impropriety when, despite the clarity of these prohibitions, Altman's law firm is allowed to continue its representation because of the assurance that Altman and his partners will not discuss this case. The public will also justifiably perceive impropriety when, despite the prohibition of the canons, a government lawyer handles a matter and the law firm he subsequently joins is not disqualified from representation in a substantially related matter.[6] To allow such repre-

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[6] The majority opinion suggests that countervailing considerations are to be found in the public expectation of efficiency in the judicial process, and that further delay resulting from disqualification of the Gordon firm should not be tolerated. I do not think efficiency, even in the pursuit of alleged wrongdoing, justifies a failure to enforce a rule of ethics that is specifically designed to remove the temptation and opportunity for misuse of governmental authority. Moreover, I cannot agree that the delay to date and subsequently, if disqualification were ordered, is chargeable to appellants. The onus quite properly rests with the Gordon firm, which undertook a representation in the face of the Code's clear prohibition.

sentation leaves the government lawyer open to the charge that this action as a public legal officer might have been influenced by the hope of later being employed to uphold what he had done, as this Court warned in *General Motors, supra.* The appearance of impropriety should be avoided by disqualification of Altman's firm.

Whether the Code of Professional Responsibility should maintain its present rule requiring the disqualification of the former government attorney's firm is a matter on which reasonable minds may differ. Serious concerns have been expressed that the Code, as now written, may unduly restrict private employment opportunities of government lawyers and thereby impair the government's ability to attract competent attorneys. That issue is now receiving attention by those charged with responsibility for reviewing and perhaps revising the content of the Code. But until some concrete evidence of adverse consequences supplies grounds for changing the Code's present provisions, I would apply them as written, find Altman's firm to be in violation of the Code by its representation in this case, and grant the motion to disqualify to maintain the important ethical principles on which the Code is based.

APPENDIX B

Panel Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1010—August Term, 1978.

,Argued June 13, 1979 Decided September 12, 1979.)

Docket No. 79-7042

MICHAEL F. ARMSTRONG, *et al.*,

Plaintiffs-Appellees.

—v.—

CLOVIS MCALPIN, et al.

Defendants-Appellants.

Before:

VAN GRAAFEILAND and NEWMAN,* *Circuit Judges*, and BONSAL, *District Judge.***

Appeal from a ruling of the United States District Court for the Southern District of New York (Hon. Henry F. Werker, Judge), denying motion of defendants-appellants to disqualify plaintiffs' law firm.

Reversed and remanded.

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* Judge Newman was United States District Judge for the District of Connecticut, sitting by designation, at the time of oral argument.

** The Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Appendix B—Panel Decision of the United States Court of Appeals for the Second Circuit

J. Robert Lunney, New York, New York (Lunney & Crocco, New York, New York, on the brief), *for appellants.*

Franklin B. Velie, New York, New York (Gordon Hurwitz Butowsky Baker Weitzen & Shalov, New York, New York, on the brief), *for appellees.*

The Securities and Exchange Commission (Paul Gonson, Principal Assoc. Gen. Counsel, John P. Sweeney, Sp. Counsel, Anne C. Flannery, Atty., on the brief) submitted a brief as *amicus curiae.*

Newman, *Circuit Judge:*

This appeal from denial of a motion to disqualify the law firm that represents the plaintiffs raises an important issue of legal ethics: whether and in what circumstances the disqualification of a lawyer because of his prior role as a government lawyer requires the disqualification of his law firm.

Theodore Altman, Esq. served on the staff of the Securities and Exchange Commission from 1967 to October, 1975. For the last three years of his government service Altman was Assistant Director of the Division of Enforcement. Altman supervised and had direct, personal involvement in an SEC investigation of Clovis McAlpin, Capital Growth Company, S.A. (Costa Rica) ("Capital"), and other companies. SEC File No. N.Y.—5035. The investigation resulted in the filing of a complaint by the SEC on September 3, 1974, against McAlpin, Capital, and the other companies. *Securities & Exchange Commission* v. *Capital Growth Co. (Costa Rica),* 74 Civ. 3779 (S.D.N.Y.). The complaint sought injuctive relief for violations of § 10(b) of the Securities and

Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, and also the appointment of a receiver. On September 24, 1974, Michael F. Armstrong was appointed receiver for Capital by Judge Charles E. Stewart, Jr.

Immediately after leaving the SEC in 1975 Altman became an associate with the New York firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov, of which he is now a partner. In March, 1976, Armstrong approached David M. Butowsky, a partner of the Gordon firm, and requested the firm to act as litigation counsel. Butowsky promptly pointed out to Armstrong the possible issue that might arise because of Altman's prior role with the SEC in the investigation of Capital and the related companies. Both the law firm and the Receiver studied the matter and ultimately concluded that the firm could represent the Receiver provided appropriate screening procedures were instituted to prevent Altman's participation. This followed the course outlined in Formal Opinion 342 of the Committee on Professional Ethics of the American Bar Association. Acting circumspectly, the firm presented the issue to Judge Stewart, who authorized the Receiver to retain the firm. In pursuance of the procedure suggested in Opinion 342, the firm also presented the issue to the SEC and was informed that the SEC had no objection to the Receiver's retention of the firm provided Altman was screened from any participation. The Receiver then retained the Gordon firm.

On September 17, 1976, the Receiver, represented by the Gordon firm, filed the suit in which the pending controversy has arisen. The suit seeks damages in excess of $24 million for violation of federal securities laws. There is no dispute that the alleged wrongful conduct detailed in the Receiver's

complaint substantially overlaps the matters alleged in the SEC's enforcement action. Clovis McAlpin, defendant-appellant, alleged to be the principal beneficiary of the alleged fraud, was served in July, 1977. He and defendant-appellant Capital Growth Real Estate Fund, Inc. obtained extensions of time to appear and plead. On June 2, 1978, on their initial court appearance these two defendants moved to disqualify the Gordon firm because of Altman's prior SEC activity. Other defendants subsequently joined in the motion. The motion was denied by Judge Henry F. Werker on December 5, 1978. From that decision McAlpin and Capital Growth Real Estate Fund, Inc. appeal.[1]

While the standards of conduct governing attorneys practicing in the federal courts are ultimately matters for oversight by the federal judiciary, the American Bar Association's Code of Professional Responsibility has been recognized in this Circuit as a principal source of pertinent guidance. *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 n.12 (2d Cir. 1975). Canon 9 of the Code provides: "A lawyer should avoid even the appearance of professional impropriety." Ethical Consideration 9-3 provides: "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." Finally, Disciplinary Rule (DR) 9-101(B) provides: "A lawyer

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[1] Denial of a motion to disqualify counsel remains appealable, *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (*en banc*), despite "rumbles of discontent," *Board of Education v. Nyquist*, 590 F.2d 1241, 1247, n.8 (2d Cir. 1979).

shall not accept private employment in a matter in which he had a substantial responsibility while he was a public employee."

It is acknowledged in this case that Altman's activity with the SEC in connection with the Capital investigation disqualifies him from the Receiver's lawsuit. The issue is whether the disqualification extends to his law firm.

Prior to 1974, DR 5-105(D) provides that affiliated lawyers were disqualified whenever the lawyer in question was disqualified by DR 5-105, which concerns conflict of interests. At the February, 1974 mid-year meeting of the ABA, DR 5-105(D) was broadened to disqualify affiliated lawyers when the lawyer in question is disqualified by any of the disciplinary rules. The amended version provides: "If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no parner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

Though the textual relationship between DR 9-101(B) and amended DR 5-105(D) seems evident, it has been reported that the ABA committee that proposed the amendment did not consider the impact upon firms that included former government lawyers. Moskowitz, *Can D.C. Lawyers Cut the Ties that Bind?* Juris Doctor (Sept. 1976), at 34.[2] Shortly after DR 5-105(D) was amended, the ABA's Committee on Ethics and Professional Responsibility was asked to consider the impact of the amended Disciplinary Rule

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[2] It seems evident that the broadening of DR 5-105(D) was not intended to require law firm disqualification in every instance where a lawyer in the firm is disqualified by a disciplinary rule. For example, DR 2-110(B)(3) requires a lawyer to withdraw from employment if his "mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively."

on DR 9-101(B). On November 24, 1975, the Committee issued Formal Opinion 342, 62 A.B.A.J. 517 (1975). Opinion 342 concludes that a lawyer's disqualification under DR 9-101(B) does not inevitably extend to his law firm. The Opinion requires "screening measures" that will "effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it." *Id.* at 521. The Opinion permits the firm to accept or continue representation if the government agency with which the attorney in question was formerly employed approves the screening procedures and is satisfied that there is "no appearance of significant impropriety affecting the interests of the government." *Ibid.* In addition, the law firm must make "its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety." *Ibid.*

The issue has also received additional thoughtful consideration. The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York has issued Opinion No. 889, agreeing with the ABA Opinion that for most cases screening of the former government lawyer will afford adequate protection. 31 The Record 552 (1976). The New York City Bar Opinion, however, would not leave the adequacy of screening procedures to the government agency, but would require approval by the tribunal before which the private lawsuit is pending. *Id.* at 566. In the District of Columbia, a draft report of the Committee on Legal Ethics of the District of Columbia Bar initially expressed the view that screening procedures could not suffice to prevent disqualification of a firm with which an attorney disqualified by DR 9-101(B) was affiliated. See *Tentative Draft Opinion for Comment, Inquiry 19,* District Lawyer (Fall 1976), at 39. Later the

D.C. Committee recommended amendments to the Code that would permit screening when approved by the government agency that employed the disqualified attorney. District Lawyer (Aug.-Sept. 1978), at 44. Recently the Board of Governors of the D.C. Bar has recommended to the District of Columbia Court of Appeals adoption of Code amendments that would permit screening subject to challenge in court, but without the need for approval by the government agency. District Lawyer (Apr.-May 1979), at 47. That proposal is awaiting consideration by the District of Columbia Court of Appeals. Support for screening procedures has also been expressed to the D.C. Bar by the SEC, the Internal Revenue Service, and the Department of Justice, and the SEC supports that position in its *amicus* brief filed in this case.

In the courts disqualification of a lawyer because of his prior government employment on a related matter has been strictly enforced under DR9-101(B), *General Motors Corp. v. City of New York,* 501 F.2d 639 (2d Cir. 1974); *Telos, Inc.* v. *Hawaiian Telephone Co.,* 397 F. Supp. 1314 (D. Haw. 1975); *Handelman v. Weiss,* 368 F. Supp. 258 (S.D. N.Y. 1973); see also *United States v. Ostrer,* —— F.2d —— (2d Cir. 1979); *Traylor v. City of Amarillo, Texas,* 335 F. Supp. 423 (N.D. Tex. 1971); and under its predecessor, Canon 36 of the former Canons of Professional Ethics, *Allied Realty, Inc. v. Exchange National Bank,* 408 F.2d 1099 (8th Cir.), *cert. denied,* 396 U.S. 823 (1969); *United States v. Trafficante,* 328 F.2d 117 (5th Cir. 1964); *Hilo Metals Co. v. Learner Co.,* 258 F. Supp. 23 (D. Haw. 1966); *Empire Linotype School, Inc.* v. *United States,* 143 F. Supp. 627 (S.D.N.Y. 1956). Since disqualification of a lawyer normally disqualifies his firm, *Cinema 5, Ltd. v. Cinerama, Inc., supra,* 528 F.2d at 1387; *American Can Co. v. Citrus*

Feed Co., 436 F.2d 1125, 1128-29 (5th Cir. 1971); *Laskey Brothers v. Warner Brothers Pictures*, 224 F.2d 824, 826 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956), disqualification under DR 9-101(B) has been extended to the former government lawyer's firm, *Telos, Inc.* v. *Hawaiian Telephone Co., supra; Handelman v. Weiss, supra;* see also *Traylor v. City of Amarillo, Texas, supra*, with one notable exception, *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977), to be discussed *infra*.

In the pending case, both sides seek to draw support from observations in two recent disqualification decisions of this Court. In *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977), a firm resisting disqualification, which it faced because of a conflict of interest between some of its lawyers, contended that the lawyers with conflicting interests were effectively screened from each other. This Court rejected the use of a screening arrangment. "Morgan Lewis argued below that it built a Chinese Wall within the firm and that no information passed between the two groups of attorneys and thus that no confidential information was disclosed. The court below found that no such 'Chinese Wall' could be created in a single firm. We incline to agree." *Id.* at 229 n.10; see also *Cinema 5, Ltd. v. Cinerama, Inc., supra*, 528 F.2d at 1387 n.1. Screening, appellants contend, has been prohibited.

Appellees, on the other hand, draw comfort from *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), in which an attorney was sought to be disqualified under the general "appearance of impropriety" standard of Canon 9. The attorney for parties on one side of the dispute was paid in part by a portion of union dues contributed by the opposing parties. This Court reversed the order of dis-

qualification, finding no risk that the circumstances concerning use of union dues would taint the trial. Courts were advised to be "quite hesitant" to disqualify an attorney unless his continued representation would taint the trial by risking violation of the conflict of interest standards of Canons 5 and 9, or the confidentiality standards of Canons 4 and 9. *Id.* at 1246. Disqualification, appellees contend, has been limited to circumstances not present in this case.

Neither decision is dispositive here. Rejection of screening as a device to prevent exchange of information within a law firm between attorneys with conflicting interests is not necessarily a rejection of screening in all circumstances. On the other hand, *Board of Education* recognizes that its focus on Canon 4 and 5 considerations does not inevitably preclude disqualification for violation of other standards.[3] Moreover, that decision was not at all concerned with the *extent* of a disqualification.

We have been well cautioned to proceed in these ethical matters with care, *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955) (Kaufman, J.), mindful of the concerns of the parties, the profession, and the public, *Emle Industries, Inc. v. Patentex Inc.*, 478 F.2d 562, 575 (2d Cir. 1973). The formulation of standards concerning the future employment of government attorneys involves a careful weighing of competing concerns. See generally, Kaufman, *The Former Government Attorney*

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[3] Judge Mansfield's concurring opinion in *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), recognized that a violation of DR 9-101(B) would be a proper occasion for disqualification, *id.* at 1247-48 n.1. In his view participation by the former government attorney risked the use of confidential information unavailable to the other side, which would taint the trial.

and the Canons of Professional Responsibility, 70 Harv. L. Rev. 657 (1957); Note, *Conflicts of Interest and the Former Government Attorney*, 65 Geo. L.J. 1025 (1977).

An overly strict approach to disqualification of the former government attorney and especially to disqualification of his firm impairs the client's choice of counsel and can impair the government's ability to attract non-career attorneys, if they come to believe that their post-government employment opportunities will be unduly restricted. These considerations themselves implicate ethical values concerning the availability of professional services.

On the other hand, the prohibition of DR 9-101(B) serves important values, which require appropriate enforcement. Chief among these, as this Court recognized in *General Motors Corp.* v. *City of New York, supra*, 501 F.2d at 648-49, is avoiding "the manifest possibility that . . . [a former Government lawyer's] action as a public legal officer might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done" (quoting Formal Opinion 37 of the ABA Committee on Professional Ethics). Other concerns, not present in all cases, are that the former government lawyer might take a position adverse to the government agency, might disclose confidential government information, might make unfair use of undisclosed confidential information, might receive or appear to receive favored treatment from the agency, or might be or appear to be pursuing a governmental objective in private practice, free of restrictions imposed upon government personnel.

With these concerns in mind, we conclude that it would be entirely inappropriate to attempt to formulate a rule of general application respecting the law firm of a lawyer

disqualified under DR 9-101(B) because of prior governmental activity. Variables along at least two dimensions might affect the result. First, is the "matter" for which the disqualified lawyer had "substantial responsibility" the kind of matter where the risks against which DR 9-101(B) guards are present? For example, in *Kesselhaut v. United States, supra,* the former government lawyer, as general counsel of the Federal Housing Authority, had some contact with a request for tax abatement that a New Jersey law firm was seeking to obtain for the FHA on an FHA property. The general counsel subsquently joined a Washington, D.C. firm that the New Jersey firm later retained to collect its legal fee for the successful handling of the tax abatement matter. In that context, the Court of Claims concluded, in accordance with Opinion 342, that screening of the former general counsel would be a sufficient safeguard to permit his firm to represent the New Jersey firm in its dispute with the government. While we express no opinion on that result, we note that the opportunity to handle a governmental matter so as to enhance the prospect of private employment was virtually non-existent in *Kesselhaut.* It is difficult to imagine anything the general counsel could have done (or been accused of doing) in overseeing the New Jersey firm's handling of the tax abatement matter that might have enhanced his employment by a firm later retained to collect the New Jersey firm's fee. There was no claim that he played any role in the fee arrangement.

In the pending case, however, the conduct of governmental investigation and enforcement litigation is precisely the sort of activity where the risk of being influenced by the prospect of future employment is very real.

A second appropriate inquiry is whether the "substantial responsibility" that disqualifies the former government law-

yer results from his active, personal participation in the matter or only from the nominal relationship of a supervisory official, such as an agency general counsel. In the latter case, knowledge of matters handled in his name is imputed to him. *United States* v. *Standard Oil Co., supra; Porter v. Huber,* 68 F. Supp. 132 (W.D. Wash. 1946); see also ABA Formal Opinion 37, and this imputed knowledge suffices to disqualify him under DR 9-101(B). But whether it should disqualify his firm is an issue quite different from the issue in the pending case. The appearance of impropriety is substantial if a firm is permitted to prosecute or defend a matter with which an affiliated lawyer had direct, personal involvement as a government attorney.[4] But if his relationship to the matter was the formal one of a senior supervisor, the apperance of impropriety, though sufficient to disqualify him from handling the matter, would be greatly lessened for his firm by an appropriate screening procedure.

We leave for another day determination of whether screening procedures as contemplated by ABA Opinion 342 might be appropriate when the matter handled by the former government lawyer afforded no realistic opportunity for enhancing the prospect of private employment, or when the government lawyer had only a formal supervisory relationship to the matter. But in the case before us, we conclude that screening procedures, however, faithfully observed, do not suffice to prevent disqualification of the firm.

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[4] The number of matters in which the government attorney has a direct, personal involvement, as distinguished from a formal, supervisory role, would seem to be sufficiently small so that disqualification of the firm would not significantly impair the government attorney's employment prospects nor impair the government's ability to recruit lawyers from private practice.

A government attorney with direct, personal involvement in a matter involving enforcement of laws that are the basis for private causes of action must understand, and it must appear to the public, that there will be no possibility of financial reward if he succumbs to the temptation to shape the government action in the hope of enhancing private employment.

ABA Opinion 342 expressed the view that screening of the disqualified lawyer, including barring his participation in any fees from the disqualifying case, would be effective in "destroying any incentive of the employee to handle his work so as to affect his future employment." 62 A.B.A.J. at 521. We disagree. In the first place, there is no effective way to prevent an upward adjustment of the disqualified attorney's salary, if he is an associate, or share of all other firms earnings, if he is a partner. Even if such adjustment were not overtly made to compensate for non-participation in the fees from the disqualifying case, it would be difficult to assure that such consideration did not play some subtle part in the complex of factors that determine associate bonuses or partnership shares. Moreover, the prospect of such circumvention would not be lost on the government lawyer tempted to misuse his authority. Finally, the appearance of impropriety is hardly diminished by an internal arrangement insulating fees from the disqualifying case, an arrangement that would most likely be unknown to casual observers and unpersuasive to the more informed.

There is no suggestion that Altman committed any impropriety whatever in his handling of the Capital matter for the SEC nor that his joining the Gordon firm or the Receiver's selection of that firm was actually motivated by any improper considerations. The enforcement of DR 9-101(B) and DR 5-105(D) to disqualify the Gordon firm in this case is required as a prophylactic measure to guard

against misuse of authority by government lawyers.[5] In view of the type of matter Altman handled for the SEC and his direct, personal involvement with it, disqualification of his firm is required.[6] The ruling denying appellants' motion to disqualify is reversed,[7] and the cause remanded.

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[5] It would not be realistic to expect that subtle efforts by a government lawyer to shape investigations or lawsuits in the hope of later private reward could be adequately detected and punished after the fact.

[6] Appellees suggest the motion to disqualify could have properly been denied on the ground of laches, since the motion was filed nearly two years after the suit was filed. As the District Court recognized, delay will not necessarily prevent disqualification in a proper case, *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 351 n.6 (S.D.N.Y. 1955), although in view of the tactical nature of many disqualification motions, *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring), undue delay might warrant denial, particularly in cases such as this where disqualification is considered primarily for its prophylactic effect on conduct beyond the lawsuit. However, there is no basis for invoking laches here, since the motion to disqualify was made at appellants' first court appearance after securing extensions of time to plead and only two months after the filing of the second amended complaint.

[7] It is frequently observed that a trial court's disposition of a motion to disqualify counsel will be disturbed only for abuse of discretion, though this standard is more likely to be invoked when the ruling on the motion is affirmed, *e.g., Lefrak v. Arabian American Oil Co.*, 527 F.2d 1136, 1140 (2d Cir. 1975); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Autowest, Inc. v. Peugot, Inc.*, 434 F.2d 556, 567 (2d Cir. 1970), than when it is reversed, *e.g., Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979); *International Electronics Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975). But some disqualification issues present legal questions that leave "little leeway for the exercise of discretion." *American Roller Co.* v. *Budinger*, 513 F.2d 982, 985 n.3 (3d Cir. 1975). Reversal occurs here because of our disagreement with the District Court that the principle of using screening procedures to enforce DR 9-101(B) is applicable to this type of case, rather than any disagreement over the significance of particular facts.

APPENDIX C

Decision of the United States District Court for the Southern District of New York.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76 Civ. 4155 (HFW)

December 5, 1978

MICHAEL F. ARMSTRONG, *et al.*,

Plaintiffs,

v.

CLOVIS MCALPIN, *et al.*,

Defendants.

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MEMORANDUM DECISION

HENRY F. WERKER, D.J.

Defendants Clovis McAlpin, Capital Growth Real Estate Fund, Inc., HS Equities, Inc., Bradford Trust Co., EHG Enterprises, Inc., Ariel E. Gutierrez and Enrique H. Gutierrez move to disqualify counsel for the Receiver, the law firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov (the "Gordon firm") in this securities fraud deriva-

tive suit.[1] The basis of the motion is that a partner in the firm, Theodore Altman, participated in and supervised the Securities and Exchange Commission ("SEC") investigation of Capital Growth Fund ("Growth Fund") and related entities while employed as Assistant Director of the Division of Enforcement of the SEC. The SEC investigation led to an enforcement proceeding and ultimately to the instant action.

FACTS

Theodore Altman was employed by the SEC from approximately October of 1967 to October of 1975, when he joined the Gordon firm. During the three years preceding his departure from the SEC Altman, as Assistant Director of the Division of Enforcement, played a supervisory role in various investigations. One of those investigations, *In the Matter of Clovis W. McAlpin, Capital Growth Fund, Capital Growth Company, S.A., New Providence Securities Ltd. and New Providence Securities Ltd., S.A.* (SEC File No. NY-5035) involved certain defendants in the present action. Altman's participation therein commenced in late 1973 and continued through 1974. The culmination of the SEC investigation was the issuance by Judge Stewart of an injunction against the commission of securities law violations by Growth Fund and others in *SEC* v. *Capital Growth Company, S.A. (Costa Rica)*, 74 Civ. 3779 (CES). According to Altman, while he was employed at the SEC staff attorneys reported to him on the progress of the

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[1] Despite the fact that this action is two years old, this is the first time that defendants have raised the issue of disqualification of plaintiff's counsel. Delay or laches will not, however, prevent disqualification in a proper case. *United States* v. *Standard Oil Co.*, 136 F. Supp. 345 n.6 (S.D.N.Y. 1955).

Growth Fund investigation and litigation, and he in turn rendered advice and directions. He signed documents and correspondence addressed to defendant Clovis McAlpin but alleges he was not involved in the matter on a day-to-day basis.

On September 24, 1974 Judge Stewart, pursuant to the SEC's request, appointed a Receiver, Michael Armstrong, in the *Capital Growth Company* action. In March of 1976 Altman was informed by another member of the Gordon firm that the Receiver had asked that firm to act as litigation counsel in the Growth Fund matter, and to commence litigation here and abroad on behalf of the Receiver to recover assets of Growth Fund and related entities. Both the Gordon firm and the Receiver were aware of Altman's involvement in the Growth Fund matter while he was employed at the SEC. They concluded that although Altman himself was disqualified by virtue of his former SEC involvement, the Gordon firm was not disqualified provided that Altman was isolated from the case pursuant to the standards in Formal Opinion 342 of the American Bar Association (Nov. 24, 1975)[2] and Opinion No. 889 of the Association of the Bar of the City of New York (Nov. 19, 1976).[3] Therefore on approximately April 30, 1976 the Receiver formally applied to Judge Stewart to retain the Gordon firm as litigation counsel. The application disclosed Altman's own disqualification and revealed that two other partners, David M. Butowsky and Franklin B. Velie, would conduct litigation but that Altman would not. The application was approved by the court.

Before instituting any Growth Fund litigation, Butowsky wrote to the SEC to obtain its comment or waiver of any

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[2] 62 ABA Journal 517 (1975).

[3] 31 *The Record* 552 (1976).

possible conflict of interest problems on the Gordon firm's part. The agency replied through Marvin E. Jacob, Associate Regional Administrator of the New York Regional Office. Jacob stated that there appeared to be no adverse interests between litigation counsel and the Receiver on the one hand, and the SEC on the other, and no appearance of impropriety. He continued that if Altman were screened from participation in the Growth Fund matter, the SEC did not believe that the Gordon firm would be disqualified from acting as litigation counsel to the Receiver. The Gordon firm has outlined how Altman has been screened. Altman is excluded from participation in the action, has no access to relevant files and derives no remuneration from funds obtained by the firm from prosecuting this action. No one at the firm is permitted to discuss the matter in his presence or allow him to view any document related to this litigation, and Altman has not imparted any information concerning Growth Fund to the firm.

Defendant's argue that Altman's knowledge of this matter must be imputed to all members of the firm and that any screening process is insufficient. Altman himself is concededly disqualified by Disciplinary Rule 9-101(B) of the American Bar Association Code of Professional Responsibility (the "Code").[4] That rule precludes private employment in any matter in which one has had substantial responsibility during prior public employment. Based upon this rule, it is defendants' position that disqualification of the entire firm is the only way to "avoid even the appear-

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[4] In this circuit the Code of Profesional Responsibility is regarded by federal and state courts as providing guidelines for profesional conduct. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 227 n.2 (2d Cir. 1977).

ance of professional impropriety" mandated by Canon 9 of the Code. They further urge that this court be guided by case law containing language to the effect that what one partner cannot do, his firm cannot do. *E.g., Laskey Bros, Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824, 826 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976); *Handelman* v. *Weiss*, 368 F. Supp. 258, 264 (S.D.N.Y. 1973); *see Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 229 n.10 (2d Cir. 1977).

DISCUSSION

The issue of whether the disqualification of one partner must be imputed to his entire law firm has been considered in detail by both the American Bar Association (the "A.B.A.") and the Ethics Committee of the Association of the Bar of the City of New York (the "Association") in the above mentioned opinions. This consideration was apparently precipitated by the adoption of Disciplinary Rule 5-105(D) in 1974. That rule provides that "[i]f a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." D.R. 5-105(D) effectively automatically disqualified an entire law firm when one partner was disqualified, like Altman, under D.R. 9-101(B). The ABA noted in its Formal Opinion No. 342 that "[p]ast government employment creates an unusual situation in which an inflexible application of D.R. 5-105(D) would actually thwart the policy considerations underlying D.R. 9-101(B)." 62 *A.B.A. Journal* 517, 520 (1975). Therefore, the A.B.A. Committee continued, the application of

D.R. 5-105(D) in a situation where the former government employee is disqualified through D.R. 9-101(B) should be analyzed in light of certain policy considerations such as the possibility of an unreasonable limitation on the recruitment of government attorneys, preservation of confidential information, the avoidance of an appearance of impropriety, and the discouraging of the handling of government matters in ways that may encourage subsequent private employment in those same particular matters. *Id.* The Committee concluded that the policies underlying D.R. 9-101(B) could be realized without a blanket disqualification rule by applying D.R. 5-105(D) to disqualify a firm where the disqualified individual has not been screened to the satisfaction of the agency concerned. The Committee thus took the position that, absent an appearance of significant impropriety, a government agency could waive D.R. 5-105(D) when satisfied that screening procedures effectively isolated the individual firm member who had previously dealt with the same matter.

The other opinion addressed to the instant issue is No. 889 of the Association, 31 *The Record* 552 (1976). There, the Association's Ethics Committee, like the A.B.A. Committee, rejected any absolute rule of disqualification of a firm due to an individual member's disqualification under D.R. 9-101(B). Instead, the Committee for the Association adopted the position that "where a lawyer who is himself disqualified under D.R. 9-101(B) can be effectively isolated from the handling of a matter by his partners and associates, and where this isolation is sufficient to avoid [an] appearance of impropriety, then the disqualification should not extend to the lawyer's partners and associates." 31 *The Record* at 566. The Committee recognized, however, that

situations may arise where the firm must be disqualified due to inadequate screening of the individual attorney, *id.* at 568, or an appearance of impropriety that simply cannot be removed by any degree of screening when the disqualified attorney's relationship with the matter in government was extremely close and significant. *Id.* at 571.

In the instant case the SEC has voiced no objection to the Gordon firm's participation in this lawsuit. The court does not find this dispositive. The SEC is not a party to this action; additionally, it is not surprising that the SEC has no objection to the Gordon firm's representation of the Receiver since both the Receiver in this action and the SEC in the prior enforcement action appear to share the same interest—rectifying the alleged misappropriation of assets of the Capital Growth companies. Thus the SEC cannot waive for defendants their objections to the qualification of plaintiffs' counsel here. Despite this, after carefully reviewing the facts of this case, the screening procedures employed to isolate Altman, and the affidavits, memoranda, and exhibits submitted by the parties, the court is satisfied that there is no actual impropriety and no appearance of impropriety under all the circumstances. Accordingly, the Gordon firm need not be disqualified.

This case is dissimilar to *Handelman* v. *Weiss,* 368 F. Supp. 258 (S.D.N.Y. 1973), relied upon by defendants. There the individual attorney, along with his firm, was actively prosecuting a securities fraud suit, the substance of which the individual had previously worked on as assistant to the trustee's attorney under the Securities Investors Protection Act of 1970. The court found from the documents before it that the attorney had formed a definite intent while working for the Securities Investor Protection Corporation to develop a subsequent suit against defen-

dants. Thus the court viewed the attorney as being twice compensated for the same labors. 368 F. Supp. at 264 & n.11. Further, the court extended the individual's disqualification to the entire firm because there was "no reason to suppose that Salomon has not communicated his views of this case to his partners, and his knowledge must therefore be imputed to them." *Id.* In comparison, nothing before this court indicates that Altman, while employed by the SEC, formed an intent to prosecute a later action involving Growth Fund. Indeed, sworn affidavits reveal that he has never participated in any fashion whatever in the Gordon firm's representation of the Receiver, nor has he shared in the firm's income derived from prosecution of this action. And, unlike the *Handelman* case, Altman and his two partners Velie and Butowsky have attested under penalty of perjury that Altman has never discussed the action with other firm members. These statements are uncontradicted by defendants and provide a basis for *not* imputing Altman's knowledge to other members of the firm.

Other authorities cited by defendant are also factually inapposite. *Telos, Inc.* v. *Hawaiian Telephone Co.*, 397 F. Supp. 1314 (D. Hawaii 1975) involved a former government attorney who himself later actively participated in private litigation similar to a suit he had filed on behalf of the government. The same was true in *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974). *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) involved a situation wherein the firm in which an attorney was a partner was suing a client of another firm where the same attorney was also a partner. Similarly, *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) involved an issue of conflicting representation.

Plaintiff's counsel was disqualified since it was in a position to obtain confidential information from another law firm representing the defendant Arthur Andersen. And *Laskey Bros., Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1965) did not involve a former government employee but a two man law firm representing plaintiff where one partner had previously represented the defendants in similar litigation.

After duly considering the case law and A.B.A. and Association opinions outlined above, the court finds that the proper screening of Altman rather than disqualification of the Gordon firm is the solution to the present dispute. The Receiver's retention of the Gordon firm has resulted in no prejudice to defendants, who attempt to paint a picture of the SEC providing discovery documents to plaintiff's firm while denying them to defendants. The facts, as opposed to defendants' speculation, show that the SEC provided the *Receiver* with the documents in question prior to his retention of the Gordon firm. Velie affid. at 4. Further, the Receiver is prepared to provide any and all of this information to defendants upon a discovery request. There is nothing unfair or prejudicial about this discovery arrangement, and the court declines to view it as providing a basis for an appearance of impropriety. Further, it should be noted that if indeed anyone has been prejudiced to date it is the Receiver rather than the defendants due to the latter's dilatoriness in moving to disqualify counsel two years into this litigation. As Judge Gurfein observed in his concurring opinion in *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975):

> "the attempt by an opposing party to disqualify the other side's lawyer must be viewed as a part of the

> tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism from possibly overcoming substantial justice to the parties."

Id. at 1360.

In conclusion, the court agrees with the view expressed in *Kesselhaut* v. *United States,* 555 F.2d 791 (Ct. Cl. 1977) (per curiam) as to private retention of a firm in a matter wherein one member has had prior governmental experience:

> We share the view expressed in the above-mentioned Formal Opinion 342 that an inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening such as we now have here, when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which knowledge of the facts will dissipate.

Id. at 793. In refusing to disqualify plaintiffs' firm the court emphasizes that it finds this holding appropirate under all the circumstances of this particular case but recognizes that different facts might well compel a contrary result.[5]

---

[5] In evaluating all the facts of the present situation the court has considered the most recent submission of Clovis McAlpin and Capital Growth Real Estate Fund, Inc. There defendants attempt to show that Mr. Altman, while in private practice, worked on a matter involving an "EHG transaction" as attorney for special counsel to International Controls Corporation in *International Controls Corp.* v. *Hogan & Hartson,* 77 Civ. 5764 (RJW).

(footnote continued on following page)

Appendix C—Decision of the United States District Court for the Southern District of New York

Defendants' motion is denied. All motions addressed to the second amended complaint are ordered returnable on the thirtieth day from entry of this decision.[6]

So Ordered.

Dated: New York, New York
December 5, 1978

Henry F. Werker
U.S.D.J.

(footnote continued from preceding page)

Since the words "EHG transaction" are also used in the sixth, seventh, and eighth causes of action in the complaint pleaded in the instant action, defendants contend that Altman has not been totally screened from this suit at the Gordon firm. It suffices to note that an examination of the documents relating to the "EHG transaction" in *International Controls Corp.* v. *Hogan & Hartson* and a reading of the fraud causes of action concerning the "EHG transaction" in this suit reveal that the subject matter of each is distinct. Defendants' attempt to rebutt Altman's affirmation that he has been fully screened from the prosecution of this action is therefore rejected.

[6] A determination on a disqualification motion is directly appealable within this circuit. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc); *Allegaert* v. *Perot*, 565 F.2d 246, 247 n.1 (2d Cir. 1977). Since an appeal from this decision will necessarily alter the briefing schedule for motions, defendants are directed to notify promptly this court and plaintiffs' counsel of intent, if any, to appeal to the Second Circuit.

No. 80-431

IN THE

Supreme Court of the United States

October Term, 1980

OCT 17 1980

CLOVIS MCALPIN and
CAPITAL GROWTH REAL ESTATE FUND, INC.,

Petitioners,

against

MICHAEL F. ARMSTRONG, as Receiver of CAPITAL GROWTH COMPANY, S.A. (Costa Rica) and CAPITAL GROWTH COMPANY, S.A. (Panama), ROBERT MOORE, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH FUND and FRANCESCO GALOFARO, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH REAL ESTATE FUND, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Should this Court grant certiorari in this case to review the appealability of orders denying motions to disqualify attorneys where the Court has already agreed to review this precise issue in another case, *Firestone Tire & Rubber Co.* v. *Risjord,* No. 79-1420, and where the Court's determination of the issue, either in this case or in *Firestone,* can have no effect upon the parties here as the matter of disqualification in this case has already been fully heard on appeal and determined?

2. Should this Court grant certiorari to review detailed fact findings and legal conclusions of the Second Circuit Court of Appeals holding that a law firm should not be disqualified because of its employment of a former government attorney who had had supervisory responsibility for a related case, under the following circumstances:

a) the former government attorney was "screened" from any participation in the matter pursuant to court order, agency approval, and an ABA ethics opinion approving such a procedure;

b) both the District Court and the Court of Appeals found there was no impropriety, nor any risk of taint to the judicial process;

c) the decision below is consistent with all case authority on this issue and there is no conflict among the circuits;

d) petitioners do not claim any constitutional or statutory right is implicated, and congressional expressions on this subject, as well as the consensus of critical and professional commentary, are in accord?

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No. 80-431

IN THE

Supreme Court of the United States

October Term, 1980

CLOVIS MCALPIN and
CAPITAL GROWTH REAL ESTATE FUND, INC.,

Petitioners,

against

MICHAEL F. ARMSTRONG, as Receiver of CAPITAL GROWTH COMPANY, S.A. (Costa Rica) and CAPITAL GROWTH COMPANY, S.A. (Panama), ROBERT MOORE, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH FUND and FRANCESCO GALOFARO, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH REAL ESTATE FUND, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted by the respondents Michael F. Armstrong, as Receiver of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama), Robert Moore and Francesco Galofaro, in opposition to the petition for a writ of certiorari filed by petitioners Clovis McAlpin and Capital Growth Real Estate Fund, Inc.

Statement of the Case

The findings of fact in this case, set forth in great detail in the opinions of both the District Court (A. 66-68)[1] and the Second Circuit Court of Appeals, sitting *en banc* (A. 4-9), are substantially at variance with those set forth in the petition. Since the holdings in this case are principally premised upon these fact findings, and since it is the findings of fact which largely draw petitioners' fire,[2] they are reviewed here.

Facts

On September 3, 1974, the Securities and Exchange Commission culminated a nine-month investigation by instituting an action in the United States District Court for the Southern District of New York entitled *SEC* v. *Capital Growth Company, S.A. (Costa Rica) et al.*, 74 Civ. 3779 (CES) (the "SEC case") (181a). The complaint charged that petitioner Clovis McAlpin, aided by a number of other parties, looted millions of dollars from a group of related

1. References to pages of the appendices to the petition are designated "A. ——". References to the Joint Appendix in the Second Circuit, submitted with the petition, are designated "——a."

2. For example, compare the findings of the District Court regarding the total screening and isolation by respondents' attorneys of Theodore Altman, whose former position with the SEC in Washington provoked the dismissal motion (A. 68, A. 72, adopted by the Second Circuit, A. 22-23), with petitioners' claim to the contrary (Petition, at 7). Similarly, compare the findings regarding Altman's general supervisory role of the SEC investigation and his merely formal relationship with the litigation conducted by the New York Regional Office of the SEC (A. 66-67, A. 7-8), with petitioners' inflated claims of Altman's involvement with the matter at the SEC (Petition, at 5-6). Finally, compare the petitioners' claim that they have been denied SEC investigatory documents (Petition, at 7), with the District Court's finding that the documents are available in discovery (A. 73; *see also* 165-67a).

investment companies (referred to herein collectively as "Capital Growth"), of which McAlpin was President and Chairman of the Board. McAlpin, who had fled to Costa Rica, and certain other defendants, failed to appear in the action and a default judgment was entered against them (*see* A. 4-5).

In the complaint, the SEC requested the District Court to appoint a receiver to protect the interests of the Capital Growth shareholders and, on September 24, 1974, respondent Michael F. Armstrong was appointed Receiver of the Capital Growth companies (88a). The court charged Armstrong, as Receiver, with the responsibility of attempting to recover all monies and property which were due the Capital Growth shareholders as a result of the misappropriations engineered by McAlpin (90a). In order to recover these monies and property, Armstrong was authorized by the court to conduct investigations and institute litigation in the United States and abroad (90-91a).

Armstrong moved to have the New York law firm of Barrett Smith Schapiro & Simon, of which he was a partner, appointed as his counsel and, on October 23, 1974, the District Court entered an order approving the appointment of the Barrett Smith firm (131a).

Soon after the appointment of the Receiver, the SEC, pursuant to its regular practice, made its investigatory files available to him (131-32a).[3] The Barrett Smith firm

3. Contrary to McAlpin's accusation of "favoritism" (Petition, at 4, 7, 17 & n.17), the SEC made its files available to the Receiver, *not* to the Receiver's present litigation counsel, Gordon Hurwitz Butowsky Baker Weitzen & Shalov, and did so two years before the Gordon firm was retained. The fact is that no matter who the Receiver or his counsel was, the SEC's practice is to make such files available (A. 5-6).

thoroughly reviewed the SEC files, researched the applicable law, conducted its own factual investigation, and began to develop a plan of litigation which included lawsuits against a number of the great many individuals and business entities involved with McAlpin's tangled affairs. These efforts, together with the task of reducing to possession various Capital Growth properties in the continental United States and Puerto Rico, substantially consumed the time and effort of the Receiver and his counsel for about a year-and-a-half, continuing into early 1976.

As the investigation conducted by the Receiver and the Barrett Smith firm progressed into 1976, a potential problem of appearances arose, involving a potential defendant that was a financial institution which had been a client of the Barrett Smith firm. The Receiver decided that Barrett Smith should avoid taking an active role in the actual handling of litigation which might involve this particular potential defendant. Consequently, despite the substantial investment in time already made by the Barrett Smith firm,[4] the Receiver found it necessary to find substitute litigation counsel (133a).

Since McAlpin had absconded to Costa Rica with most of Capital Growth's remaining assets, the funds available to the Receiver were extremely limited.[5] Consequently, it was necessary to find a firm that was not only equipped to handle difficult litigation in Costa Rica as well as in the

4. Prior to the substitution of counsel, Barrett Smith had devoted approximately 2,600 hours to the receivership, consisting of services on the part of five partners, eight associates and three paraprofessionals.

5. Cash on hand at that time was approximately $200,000 (140a).

United States, but was willing to make a commitment to pursue the case to conclusion, even if little or no funds were available to pay interim compensation (135a). It was also necessary to obtain counsel with sufficient manpower to deal with the flood of paper which was sure to be generated by a large litigation with a number of major institutional defendants (A. 6-7).

Attempting to find a firm which would consider the case economically feasible, the Receiver sought one that was already involved in similar litigation in Costa Rica, such as a firm involved in litigation concerning the activities of Robert L. Vesco, who had also fled to Costa Rica. The Receiver discussed the case with several such firms, and was turned down by two firms, before contacting the Gordon firm (133a).

In March 1976, the Receiver first approached the Gordon firm, which in the Receiver's judgment was highly qualified to handle the case. David M. Butowsky, a partner in the Gordon firm, was Special Counsel to International Controls Corporation and, in that capacity, was conducting various legal actvities in Costa Rica relating to alleged Vesco defalcations (134a). Another partner had served in the United States Attorney's office for the Southern District of New York, where he had been in charge of a number of complex fraud cases. Due to the Gordon firm's ongoing activities in Costa Rica, the Receiver believed it might realize significant economies for the receivership's limited funds (133a).

During one of the early meetings following his initial approach to the Gordon firm, the Receiver learned for the

first time that Theodore Altman, who had served as an attorney with the SEC in its Washington, D.C. headquarters from 1967 to 1975, had recently become an associate at the Gordon firm (120-21a, 151a). Altman's position in 1974 was Assistant Director of the Division of Enforcement. As such, he was one of the highest ranking enforcement officers at the SEC, with about twenty-five staff members working under him in Washington.

Altman's role in the Capital Growth case was a supervisory one. This was only one of a significant number of similar cases throughout the country for which he had such responsibility. While he was generally aware of the facts in the case, he was not personally involved on a daily basis (150-51a).[6]

Most of the SEC's work on the Capital Growth investigation was handled by the staff of the New York Regional Office. The SEC complaint was prepared and filed by the New York office; signed by the New York Regional Administrator, the Associate Regional Administrator and a New York staff attorney, and litigated out of the New York office (198a).[7]

6. For example, the record reflects that two of the three letters to McAlpin from the SEC concerning Capital Growth were written by one of Altman's subordinates, Alan Rosenberg (98a, 103a). The one letter which Altman did write to McAlpin, on August 6, 1974, was an innocuous response to a letter from McAlpin, addressed to Rosenberg. In it, Altman stated that he was writing to McAlpin because Rosenberg had "left the Commission for private employment", and explained that he was only "generally aware of [McAlpin's] prior conversations and correspondence with Mr. Rosenberg . . . ." In the letter, Altman responds to McAlpin's request for information by suggesting that McAlpin consult his own attorney (105a).

7. Altman's name, like that of Stanley Sporkin, Director of the SEC's Enforcement Division, appeared on the complaint, but neither man signed it, nor was Altman, as McAlpin contends (Petition, at 6), "attorney of record."

In the course of their investigation, the Receiver and the Barrett Smith firm dealt almost exclusively with New York personnel of the SEC and, insofar as there was contact with the Washington office, it was with a supervisory attorney heading a unit separate from Altman's.

In October 1975, at a time when the Receiver and the Barrett Smith firm were in the midst of analyzing the SEC files, conducting their investigation and evaluating litigation possibilities, Altman resigned his position at the SEC to become an associate at the Gordon firm (151a). At the time, the Receiver had no reason to be aware of Altman's departure from the SEC, much less his new affiliation with the Gordon firm. Moreover, neither the Receiver, his counsel, Altman nor the Gordon firm could at that time have foreseen the course of events leading to the Receiver's retention of new counsel.

With the knowledge of Altman's prior SEC affiliation, both the Gordon firm and Barrett Smith undertook to determine the significance, if any, of the fact that Altman had had a supervisory role in the SEC's Capital Growth case. After researching the question thoroughly, both firms decided that Altman himself could not participate in the representation. However, both firms also concluded that Altman's SEC supervisory role did not require the firm's disqualification if certain procedures mandated by a formal opinion of the American Bar Association were followed.

The ABA had previously ruled that an individual lawyer's prior involvement in a matter while with the Government did not disqualify his law firm from employment in the same or a related matter if that lawyer were

screened from knowledge of, or participation in, the case. ABA Comm. on Professional Ethics, Formal Opinion No. 342, 62 *ABA Journal* 517 (1975) ("ABA Opinion 342"). *See also* Comm. on Professional and Judicial Ethics, Association of the Bar of the City of New York, Opinion No. 889, 31 *The Record* 552 (1976).

In early 1976, after several meetings between the Receiver and members of the Gordon firm, the firm accepted the representation, agreeing to "conduct all Capital Growth litigation through to conclusion" even if the Receiver lacked sufficient funds for compensation as the litigation progressed (135a). The Receiver and the Gordon firm further agreed that, in accordance with ABA Opinion 342, Altman would have no participation in the Capital Growth matter, that he would be screened and isolated from any knowledge of the case, and that he would not participate in any of the firm's earnings from the case (151a). Finally, it was agreed that the matter should be brought to the attention of the District Court for approval (121a).

On April 30, 1976, the Receiver submitted an affidavit to the District Court requesting that the Gordon firm be appointed to replace Barrett Smith as litigation counsel. In his affidavit, the Receiver disclosed Altman's previous involvement with the Capital Growth matter and informed the court that Altman would be screened from the case (134a). The District Court approved the Receiver's request to retain the Gordon firm (127-29a).

On May 10, 1976, pursuant to the procedure suggested by ABA Opinion 342, Butowsky wrote to Paul Gonson,

Associate General Counsel of the SEC, to determine whether the SEC had any objection to the Gordon firm's participation in the Capital Growth matter in light of Altman's prior employment (143a). The matter was referred to Marvin E. Jacob, Associate Regional Administrator for the New York Region of the SEC, who, in a letter dated July 8, 1976, stated that the SEC did not see any ground for disqualification of the Gordon firm and had no objection to retention of the Gordon firm as litigation counsel if Altman were screened from any participation in the matter (147a).

Following the Gordon firm's engagement, the litigation files, including those received from the SEC, were turned over by Barrett Smith and the lengthy task of transferring accumulated knowledge about the case was begun.[8]

It is uncontradicted, and the courts below found, that throughout the course of work conducted by the Gordon firm, Altman has been screened from any contact with the matter. Attorneys, paralegals, and secretaries who work on the Capital Growth matter in the firm have been under instructions not to discuss the matter in his presence. Altman has not had access to any document or file in the case. At no time has Altman imparted any information which he may have had regarding the merits of the matter to anyone in the firm. Nor has Altman received any financial benefit by virtue of the firm's conduct of the matter (122a, 151a; A. 68, 72; A. 22-23, 28).

8. The present action was commenced thereafter, in September, 1976.

Decisions Below

In denying petitioners' motion to disqualify, the District Court concluded that the Gordon firm had properly followed the dictates of ABA Opinion 342 and the subsequent opinion of the Association of the Bar of the City of New York to the same effect, and that there was no appearance of impropriety in the Gordon firm's continued representation of the Receiver (A. 73). The court further found that appellants had suffered no prejudice. On the contrary, in opposition to the motion, the Receiver showed that, because of the small size of the estate, the additional costs of employing new counsel might require that the matter be discontinued (123a).

A panel of the Second Circuit Court of Appeals adopted the District Court's fact finding that there had been no impropriety or taint, but reversed in order to set out a "prophylactic measure" to prevent an "appearance of impropriety" (A. 62-63). The Court of Appeals, in its comprehensive *en banc* opinion by Circuit Judge (now Chief Judge) Feinberg, vacated the opinion of the panel and affirmed the District Court's order.[9] The opinion adopted the fact findings of the District Court and stressed that there was "no threat of taint" to the integrity of the trial process (A. 30), and it noted that the "disqualification of the Gordon firm will have serious consequences for this litigation; separating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart, his attempt to obtain redress for defendants' alleged frauds." (A. 29). In particular, the Court of

9. The *en banc* opinion of the Second Circuit in this case is now officially reported at 625 F.2d 433.

Appeals referred to the facts, found by the District Court, that

> "the receiver will not be making unfair use of information obtained by Altman as a government official, since the SEC files were turned over to the receiver long before he retained the Gordon firm and Altman has been entirely screened from all participation in the case, to the satisfaction of the district court and the SEC."

(A. 28; footnote omitted). The Second Circuit, in concluding that "the possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . .' " (A. 29), quoting *Board of Education of New York City* v. *Nyquist,* 590 F.2d 1241, 1247 (2d Cir. 1979), was thus careful expressly to limit its holding on the appropriateness of screening to

> "a case such as this, where no threat of taint exists and where appellants' motion to disqualify opposing counsel has successfully crippled the efforts of a receiver, appointed at the request of a public agency, to obtain redress for alleged serious frauds on the investing public."

(A. 30).[10]

---

10. The *en banc* opinion of the Second Circuit was concurred in by all the participating judges, with the exceptions of Judges Meskill and Mulligan, who concurred on the merits but dissented as to appealability, Judge Van Graafeiland, who concurred regarding appealability but took no position on the merits, and Judge Newman (the author of the panel opinion), who concurred regarding appealability but dissented regarding the merits.

Reasons for Denying the Writ

I

The Question of Appealability under 28 U.S.C. § 1291 Is Effectively Moot.

The Second Circuit, in its *en banc* opinion in this case, held that orders denying disqualification motions are not immediately appealable as final orders under the rule of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Nevertheless, the Second Circuit proceeded to review this case on the merits of the denial of the disqualification motion because (i) "a refusal to do so will leave the law of the circuit on attorney disqualifications in a muddled state" because of the existence of the panel's opinion (A. 20); (ii) the district courts would be provided with no guidance on the standards to apply in disqualification situations, an impact which would have been most immediately felt upon the remand of the present case, and (iii) there would have been "an enormous waste of judicial resources" in this case (*id.*), particularly since the issue would ultimately have to come back for review if the petitioners or other defendants in this case are unsuccessful at trial. The rule regarding appealability from the denial of disqualification motions was thus held to be prospective only.[11] The Court of Appeals went on, for sixteen of the twenty-four pages of the slip opinion, to review the merits of the disqualifica-

11. Indeed, in a later opinion in an unrelated case, the Second Circuit applied this same rationale to review, and reverse, the denial of a motion for disqualification where the appeal had been filed, briefed, argued, and considered prior to the filing of the *en banc* opinion in the present case. *Cheng* v. *GAF Corp.*, Dkt. No. 80-7254 (2d Cir., August 26, 1980).

tion claim. Accordingly, this case has already been appealed, reviewed and determined on the merits.

This Court has repeatedly held that, because of the limitations imposed by Article III of the Constitution, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971); *Oil Workers Union* v. *Missouri,* 361 U.S. 363, 367 (1960). *See DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974). On the appealability issue raised in this case, there has ceased to be a "definite and concrete" controversy which "touch[es] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937). Whether the holding of the Second Circuit on the issue of appealability is affirmed or reversed, the petitioners have already received Second Circuit review of the disqualification issue. If this Court concurs with the decision rejecting appealability, there would be no need to reach the question of the standards for disqualification. Similarly, if this Court were to accept review on the appealability question and reverse, holding that orders denying motions to disqualify are appealable, there would be no need to remand the case to the Second Circuit since this case has already been considered and determined on appeal.

In addition, as petitioners have pointed out, this Court has already agreed to review the issue of appealability sought to be presented in this case by granting the petition for a writ of certiorari in *Firestone Tire & Rubber Co.* v. *Risjord,* —— U.S. ——, 48 U.S.L.W. 3733 (U.S. May 12, 1980) (No. 79-1420). By reason of the grant of the petition

in *Firestone*, this Court has assured that the public interest in having this procedural issue resolved, *cf., United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309-10 (1897), as well as the paramount interest in the uniformity of interpretation under 28 U.S.C. § 1291 will be served and a uniform rule, establishing the proper procedure in all of the federal courts, will be promulgated. On the other hand, a determination to hold this petition pending a decision in *Firestone* could only serve to exacerbate the delay and disruption which, for fully two years, "has successfully crippled the efforts of a receiver . . . to obtain redress for alleged serious frauds on the investing public." (A. 30).

Therefore, the present petition for a writ of certiorari raises no question on the appealability issue necessary or appropriate for review by this Court. Indeed, the issue of appealability of an order denying a motion to disqualify is, in a practical sense, moot insofar as the present case is concerned.

II

The Decision of the Court of Appeals on Disqualification Creates No Conflict with Any Decision of this Court or of Any Other Circuit and Decided No Significant Unsettled Question of Federal Law.

In its decision affirming the District Court's denial of the motion to disqualify the Receiver's counsel, the Second Circuit applied a flexible rule designed to take account of the particular facts of each case. Under that rule, the disqualification of attorneys is called for only when the challenged conduct has affected or will affect the outcome

of the proceeding in which the attorneys are involved. *Board of Education* v. *Nyquist, supra; Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 236 (2d Cir. 1977). In reaching the conclusion not to disqualify the Receiver's counsel, the Second Circuit relied on the detailed factual findings made by the District Court, and in particular, those findings that "no threat of taint exists" (A. 30), and that there was no "appearance of impropriety" sufficient to warrant disqualification (*id.*). By so structuring its opinion as to rely heavily upon the detailed findings of fact of the District Court, the Second Circuit has made it clear that it was not decreeing an absolute disqualification rule which would automatically apply any time lawyers affiliated with a former government attorney appeared in a case. The Second Circuit fully recognized that there might exist situations where disqualification would in fact be appropriate. *See* A. 30. However, it held that, based upon the District Court's finding that "the Gordon firm's representation of the receiver posed no threat to the integrity of the trial process" and that "disqualification of the Gordon firm will have serious consequences for this litigation" (A. 29), the total screening of Altman was held to be appropriate and need not be accompanied by disqualification of his entire firm.

The decision by the Second Circuit in this case is fully consistent with prior case authority in this area. Indeed, those cases which have considered the application of "screening" procedures to isolate effectively former government attorneys from the conduct of litigations related to matters they might have handled or supervised while in the Government have fully endorsed the practice. *See Central Milk Producers Cooperative* v. *Sentry Food Stores,*

Inc., 573 F.2d 988 (8th Cir. 1978); *Kesselhaut* v. *United States*, 555 F.2d 791 (Ct. Cl. 1977); *United States* v. *McDonnell Douglas Corp.*, Crim. No. 79-516 (D.D.C. June 4, 1980). Other decisions tend merely to substantiate the observation that such cases vary significantly on their facts from case to case. Thus, for example, the cases cited by petitioners principally involved actual participation in private litigation by former government attorneys. *E.g.*, *Telos, Inc.* v. *Hawaiian Telephone Co.*, 397 F. Supp. 1314 (D. Hawaii 1975).[12] Similarly, the situation in this case, where the Receiver's counsel conducted itself in conformity with the letter and spirit of ABA Opinion 342, as the District Court found, is to be distinguished from situations where no such effort was made. *E.g.*, *United States* v. *Kitchin*, 592 F.2d 900 (5th Cir.), *cert. denied*, 444 U.S. 843 (1979).

Petitioners can point to no federal statute which has been violated, or to any provision of the Constitution which is even arguably implicated by the opinion of the Court of Appeals in this case. Generally, "the regulation of the activities of the bar is at the core of *the State's* power to protect the public," *Bates* v. *State Bar of Arizona*, 433

12. These cases involving former government attorneys are, of course, to be distinguished from situations where actual conflicts of interest with respect to different clients of private attorneys are involved. For example, the claim before this Court in *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, involves an asserted conflict of interest arising from an attorney's simultaneous representation of two clients with adverse interests. Such a situation accounts for the bulk of the citations made by petitioners. *E.g.*, *Cheng* v. *GAF Corp.*, *supra*; *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, *supra*; *Cinema 5 Ltd.* v. *Cinerama Inc.*, 528 F.2d 1384 (2d Cir. 1976); *Lasky Bros. of W. Va.* v. *Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). The wholly distinct situation of the former government attorney—the situation presented by this case—is the subject of a federal statute. *See infra* at 17-18 & n. 13.

U.S. 350, 361 (1977) (emphasis added). Accordingly, the prior occasions when this Court has undertaken a review of the ethical conduct of attorneys have generally involved conflicts between claims of appropriate ethical standards of conduct and explicit constitutional or statutory protections. *E.g., Bates* v. *State Bar of Arizona, supra* (Sherman Act); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975) (first amendment and Sherman Act); *Law Students Civil Rights Research Council* v. *Wadmond,* 401 U.S. 154, 157 (1971) (first amendment); *Sperry* v. *Florida ex rel. Florida Bar,* 373 U.S. 379 (1963) (35 U.S.C. § 31 regulating practice before the U.S. Patent Office); *Cohen* v. *Hurley,* 366 U.S. 117, 123-124 (1961) (fifth and fourteenth amendments).

Nor could petitioners show any conflict with any federal statute, since the one statute generally covering the ethical conduct of former government attorneys does not in any way proscribe the activities of partners or associates of the former government attorney. 18 U.S.C. § 207.[13] The

13. In the form enacted in 1962, section 207 provided, in relevant part, "A partner of a present *or former* officer or employee of [the Government] shall as such be subject to the provisions of sections 203, 205, and 207 of this title *only* as expressly provided in subsection (c) of this section." 18 U.S.C. § 207 (1964) (emphasis added). Subsection (c) of former section 207 by its terms only regulated the conduct of partners of current government officers and employees (as does the equivalent subsection in the 1978 revision, § 207(g)). In a contemporaneous memorandum regarding the 1962 enactment of section 207, the Attorney General emphasized the intent to limit the prohibitions of section 207 to partners of current government employees:

> "Subsection (c) of section 207 pertains to an individual outside the Government who is in a business or professional partnership with someone serving in the executive branch, an independent agency or the District of Columbia. The subsection prevents such individual from acting as attorney or agent for anyone other than the United States in any matters, including those in court, in which his partner in the Government is participating or has participated or which are the subject of his partner's official responsibility. *Although included in a section dealing largely with post-*

(footnote continued on next page)

existence of this statute and, more fundamentally, the thorough consideration given to this entire area by Congress in its 1978 revisions to section 207 serve both to distinguish this case from the situation presented in *Firestone* and to minimize the need for this Court to undertake an independent review of this issue.

Although section 207 specifically prohibits certain activities by partners of *current* government employees, 18 U.S.C. § 207(g), Congress did not attempt to regulate in any parallel way the conduct of partners of *former* government employees. Since the provisions regarding both present and former government employees appear in the same section of the statute, it is clear that this is an appropriate occasion for this Court to employ its "frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974).

In addition, the approach used by the Second Circuit, referring specifically to the facts of each case to determine

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employment activities, this provision is not directed to the post-employment situation."

Memorandum of Attorney General, 28 Fed. Reg. 985 (1963), 18 U.S.C. § 201 note at p. 1030 (1976) (emphasis added).

Although the 1978 revisions to section 207 have been extensive, the substance of the restrictions have *not* been expanded to include any prohibition of activity by partners of *former* government officers or employees. This fact has been emphasized by the fact that the sentence quoted at the outset of this footnote has been replaced by a change in the title of the section, to "Disqualification of former officers and employees; disqualification of partners of *current* officers and employees." 18 U.S.C. § 207 (emphasis added).

For the convenience of this Court, the current and former versions of section 207 are set forth in the Appendix to this brief.

whether or not disqualification is appropriate, seems fully consistent with the intent of Congress in structuring the proscriptions of 18 U.S.C. § 207. In particular, the report of the Senate Committee on Governmental Affairs accompanying the Senate bill which ultimately was enacted as the 1978 revisions to section 207, specifically addressed the concern, also raised by the Second Circuit (A. 23-24), that a too stringent rule would affect the ability of the Government to function effectively.

> "18 USC 207, like other conflict of interest statutes, seeks to avoid even the appearance of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.
>
> "But, as with other desirable policies, it can be pressed too far. *Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service. Both are important and a conflicts policy cannot focus on one to the detriment of the other.* There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office."

S. Rep. No. 95-170 at 32 (March 16, 1977), reprinted in 1978 *U.S. Code Cong. and Admin. News* 4217, 4248 (1978) (emphasis supplied). This is precisely the concern which led the Second Circuit to reject the *per se* rule adopted initially by the panel decision in this case.

Thus, the decision of the Second Circuit is fully consistent not only with the governing statute regarding conduct of former government attorneys, but also with the underlying expression of concern by the Congress, reported in the legislative history of the most recent revisions to section 207.

Finally, the consensus of critical and professional commentary on utilization of the screening procedures endorses the application of such procedures in situations like that presented here. Thus, the procedures advocated by the American Bar Assocation in ABA Opinion 342 have been subsequently endorsed both by the Association of the Bar of the City of New York,[14] by the New York State Bar Association,[15] by the Administrative Conference of the United States,[16] and by the District of Columbia Court of Appeals.[17] In addition, although the petitioners note that a discussion draft proposal of a study commission of the American Bar Association has proposed a *per se* disqualification rule, *see* Petition at 16-17, that very draft proposal has been severely criticized and is understood to

14. *See* Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York, Opinion No. 889, *supra*, 31 *The Record* 552.

15. New York State Bar Association Opinion No. 502 (1978), *New York Law Journal*, Jan. 18, 1979, p. 3, col. 3.

16. *See* ACUS Recommendation 79-7, 45 Fed. Reg. 2309 (Jan. 11, 1980).

17. *See* Notice of Proposed Order, adopting, with certain revisions, *inter alia*, Disciplinary Rule 9-102 of the Code of Professional Responsibility (April 17, 1980) (reported in *Legal Times of Washington*, April 28, 1980, page 24). Due to the controversy evoked by certain aspects of this proposal, the District of Columbia Court of Appeals has suspended the effective date of the proposal in order to elicit further comment from the Bar.

be undergoing substantial revision at this time.[18] *See also* Kaufman, *The Former Government Lawyer and the Canons of Professional Ethics,* 70 Harv. L. Rev. 657 (1957).

The opinion of the Second Circuit in the present case has appropriately limited the effect of its ruling to the peculiar facts presented here, fully anticipating that different situations may arise which would require disqualification of the partners and associates of a former government attorney. This result implicates no constitutional interest, violates no statute or rule of the federal courts, is fully consistent with the case authorities which have addressed the issue, and is consistent with both the expressions of Congress on this subject and the consensus of scholarly and professional opinion. No significant unsettled question of federal law is thus presented by this aspect of the petition.

Accordingly, the disqualification issue sought to be presented by petitioners is, as recognized by the Second Circuit, more appropriate for case-by-case development of the law and the considered promulgation of prescriptive rules of ethical conduct by the Bar and the states. Given the consistency of the result below with the treatment of this issue by Congress and the federal courts which have addressed it, respondents respectfully submit that a writ of certiorari should be denied, and the two-year hiatus in the conduct of this case, which "has successfully crippled the efforts of a receiver" and the important public interests he represents (A. 30), should be ended.

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18. *See, e.g.,* Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York, Preliminary Report on the ABA Proposed Model Rules of Professional Conduct (Jan. 30, 1980 draft), at 24-26 (July 1980). The Attorney General of the United States has also criticized the "imputed disqualification" provision of the ABA draft proposal. *Legal Times of Washington,* June 9, 1980, p. 23.

Conclusion

The petition for the writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied in all respects.

Dated: October 17, 1980

Respectfully submitted,

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APPENDIX

APPENDIX

18 U.S.C. § 207, as amended

Disqualification of former officers and employees; disqualification of partners of current officers and employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year,

having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d) (1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O–9 or above as described in section 201 of title 37, United States Code; or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay O–7 or O–8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethies in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

(A) an elected official of a State or local government, or

(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Govern-

ment Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from

making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.

18 U.S.C. § 207, as enacted by Pub. L. 87-849, § 1(a), 76 Stat. 1123 (Oct. 23, 1962)

Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or

(b) Whoever, having been so employed, within one year after his employment has ceased, appears personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or directly and substantially interested, and which was under his official responsibility as an officer

or employee of the Government at any time within a period of one year prior to the termination of such responsibility—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both: *Provided,* That nothing in subsection (a) or (b) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.

(c) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility—

Shall be fined not more than $5,000, or imprisoned not more than one year, or both.

A partner of a present or former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia or of a present or former special Government employee shall as such be subject to the provisions of sections 203, 205, and 207 of this title only as expressly provided in subsection (c) of this section.